2013 IL App (1st) 130662-U

FIRST DIVISION
December 9, 2013

No. 1-13-0662

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KIMBERLY VINCI, Plaintiff-Appellant, v. BALMORAL HOME, INC., Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County. No. 09 L 13338 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** Under the specific facts presented, the defendant nursing home had no duty to protect the plaintiff patient from the unforeseen criminal acts of another patient. We affirm the trial court's decision to grant summary judgment in favor of the defendant.

¶ 2 Plaintiff Kimberly Vinci, a patient at a nursing facility operated by defendant Balmoral Home, Inc. (Balmoral), sought damages for injuries she suffered when another Balmoral patient attacked her in an elevator. The trial court granted summary judgment for Balmoral, finding that the attack on Vinci was not reasonably foreseeable. We affirm.

¶ 3 BACKGROUND

¶ 4 The largely uncontested facts are set forth in the deposition testimony of Vinci, the nursing home administrator, and several nurses. Balmoral houses about 200 patients who are allowed to walk around the public areas of the facility. About 60% of Balmoral's patients suffer from some kind of mental illness. The facility has no security guards or inside surveillance cameras, but the entry/exit doors have alarms, and all visitors must sign in and out. Balmoral screens incoming patients for histories of violence and aggressive behavior and refuses patients with histories of heroin use, sex offenses, violence, or suicidal behavior. Potential patients and staffs at their prior nursing homes are interviewed to screen out those with obvious anger control issues or violent histories. Additionally, the facility performs a state police background check to eliminate patients with criminal histories. Balmoral admitted K.P. as a patient after his pre-admission check revealed no such disqualifying characteristics.

¶ 5 On September 18, 2007, Vinci entered Balmoral as a paying patient for general nursing and rehabilitation care. Two months later, on November 14, Vinci entered an elevator by herself on the first floor to return to her third-floor room. The elevator doors opened at the second floor and Vinci saw K.P. taking an unusually long time to decide whether to enter the elevator. The two patients had no prior interactions. Vinci told K.P. to make up his mind, and K.P. then entered the elevator. After the doors closed, K.P. attacked Vinci, causing severe bruising on her eye, face, ear, hand, arm and thigh. Vinci set off the elevator alarm, but the doors did not open until the elevator arrived at another floor. Nurses responded to the alarm, attended to Vinci's immediate needs, and then arranged for her to be transported to a hospital for further medical care.

¶ 6 K.P. was also a patient at Balmoral. He was diagnosed as having psycho-affective bipolar disorder and depression. Prior to the elevator attack, he had exhibited no violent tendencies while at Balmoral, and his prior medical history indicated no such tendencies. Within the hour before the attack, K.P. was seen walking around the facility staring at staff members in a state of agitation, confusion, and indecision, but not exhibiting any aggressive behavior toward others. K.P. fled Balmoral after attacking Vinci. Vinci did not pursue any legal remedies against him, and the record suggests that his whereabouts are still unknown.

¶ 7 Vinci filed this lawsuit against Balmoral for damages she incurred as the result of her injuries, alleging essentially that Balmoral failed to warn Vinci of the potential danger posed by K.P. or to secure her from K.P., and that Balmoral negligently failed to supervise and control K.P. Balmoral filed a motion for summary judgment which relied primarily on the deposition testimony of Vinci and Balmoral's administrator. Vinci filed a brief in opposition to that motion, but presented no supporting affidavits or additional depositions of her own. On November 30, 2012, the trial court issued a written opinion granting summary judgment in favor of Balmoral and against Vinci, finding that there were no issues of material fact tending to demonstrate that K. P.'s attack on Vinci was reasonably foreseeable. On January 30, 2013, the court denied Vinci's motion to reconsider that ruling. This appeal followed.

¶ 8 ANALYSIS

¶ 9 On appeal, Vinci argues that: (1) there were genuine issues of material fact regarding whether K.P.'s attack on Vinci was reasonably foreseeable; (2) even if the attack was not reasonably foreseeable, Balmoral had a duty to protect Vinci against even unforeseeable third–party criminal

attacks on Balmoral's property; and (3) the trial court erred by allowing Balmoral to support its summary judgment motion with certain evidentiary material.

¶ 10 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). We review a trial court's decision granting a motion for summary judgment *de novo.* *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In so doing, we must strictly construe the evidence against the party seeking summary judgment and liberally in favor of the opponent. *Id.*

¶ 11 Vinci's complaint sounds in negligence. Plaintiffs in negligence cases must set out sufficient facts establishing the existence of: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty, and (3) an injury proximately resulting from the breach. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992). With regard to the first element of duty, the plaintiff must show that the defendant was under an obligation to conform to a certain standard of conduct for the plaintiff's protection. *Puttman v. May Excavating Co*., 118 Ill. 2d 107, 116 (1987). Whether there is a relationship between the parties requiring that a legal obligation be imposed upon one for the benefit of the other is a question of law which the court determines in light of the particular facts of the case. *Vesey v. Chicago Housing Authority,* 145 Ill. 2d 404, 411 (1990). We examine the this case in light of these fundamental principles.

¶ 12 K.P.'s unprovoked attack on Vinci was a criminal act. Generally, defendants owe no duty to plaintiffs to protect them from the criminal acts of third parties unless the plaintiff and defendant

share one of a very limited number of specified relationships. These relationships, set forth in section 314A of the Restatement (Restatement (Second) of Torts § 314A (1965)) are: common carrier-passenger, innkeeper-guest, possessor of land-invitee, and custodian-person in lawful custody. *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215-16 (1988). None of these particular relationships existed between Vinci and Balmoral. Vinci urges, however, that Balmoral is still liable because K.P.'s attack was reasonably foreseeable and because Balmoral's voluntary undertaking of security measures imposed a duty on it regardless of whether the attack was foreseeable.

¶ 13 The existence and extent of voluntary undertakings are analyzed on a case-by-case basis. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 1004 (2005); see also *Shea v. Preservation Chicago, Inc.*, 206 Ill. App. 3d 657, 663 (1990) ("The proper inquiry is to determine whether, on a case-by-case basis, *** the circumstances demonstrate that the landlord, by retaining access to or control over the premises, assumed a duty to protect tenants against reasonably foreseeable third-party criminal attacks."). The scope of an duty assumed by a voluntary undertaking is limited by the extent of the undertaking. *Rowe*, 125 Ill. 2d at 218-19; *Bell v. Hutsell*, 2011 IL 110724, ¶ 12.

¶ 14 One who voluntarily undertakes to render services to another is liable for bodily harm caused by his failure to perform such services with due care or with such competence and skill as he possesses. *Vesey*, 145 Ill. 2d at 415. Section 323 of the Restatement (Second) of Torts (1965) formulates this principle as follows:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure

> to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323 (1965).

¶ 15 For Vinci to recover, she was required to demonstrate that Balmoral had some prior knowledge that would have reasonably caused Balmoral to conclude that K.P. was a danger to other patients. This court has summarized the legal principles applicable to this theory as follows:

> " 'Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.' "*Sameer v. Butt*, 343 Ill. App. 3d 78, 88-89 (2003) (quoting Restatement (Second) of Torts §344, Comment f (1965)).

¶ 16 Our courts have further elaborated:

> "It must be 'objectively reasonable to expect, not merely what might conceivably occur.' [Citation.] 'Where injury results from freakish, bizarre or fantastic

> circumstances, no duty is present and no negligence claim can be asserted.' [Citation.] 'Since anyone can foresee the commission of a crime virtually anywhere at any time * * * The question is not simply whether a criminal event is foreseeable, but whether a duty exists to take measures to guard against it.' " (Emphasis omitted.) *Osborne v. Stages Music Hall, Inc.*, 312 Ill. App. 3d 141, 147 (2000)(quoting *Bence v. Crawford Savings and Loan Ass'n*, 80 Ill. App. 3d 491, 495 (1980)). Accord, *Shortall v. Hawkeye's Bar & Grill,* 283 Ill. App. 3d 439, 443 (1996) ("A criminal attack by a third person is reasonably foreseeable when the circumstances are such as to put a reasonably prudent person on notice of the probability of an attack or when a serious physical altercation has already begun.").

¶ 17 Vinci relies strongly on *Siklas v. Ecker Center for Mental Health, Inc.*, 248 Ill. App. 3d 124 (1993), for the proposition that a health care facility has an ongoing duty to protect patients against even unforseeable criminal acts of third persons. However, *Siklas* does not so hold. As noted above, the existence of the duty depends on facts, particularly "past experience." *Sameer*, 343 Ill. App. 3d at 88-89. The plaintiff in *Siklas* and another patient were paired as roommates in an apartment outside the facility. The plaintiff was eventually attacked by the roommate. Although the facility and its physicians were aware of specific violent acts by the other patient, they took no steps to separate the roommates or to provide protection to the plaintiff. *Id.* at 127-128. In contrast, the record here provides us with no comparable facts regarding predilections of K.P. toward violent behavior.

¶ 18 Vinci relied strongly on a medical treatise from the American Psychiatric Association to

suggest that some persons suffering from that disorder might have violent tendencies, but, as the trial court correctly noted, the treatise was inadmissible as substantive evidence. On this issue, the evidence showed merely that K.P. suffered from schizoaffective disorder, not that the disorder would manifest itself through violence toward others.

¶ 19 The Illinois Rules of Evidence generally track their federal counterparts, but unlike the federal rules (see Fed. R. Evid. 803(18)), the Illinois rules do not permit the substantive admission of medical treatises. Ill. R. Evid. 803(18) ("reserving" the learned treatise exception to the hearsay rule). *Cf.* Fed. R. Evid. 803(18)(B) (treatise admissible if "established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice"). See also *Walski v. Tiesenga*, 72 Ill. 2d 249, 258-59 (1978); *Downey v. Dunnington*, 384 Ill. App. 3d 350, 379-80 (2008).

¶ 20 Moreover, Vinci's reliance on the treatise is misplaced because she failed to provide any expert affidavit attesting that it was authoritative or reliable. While the standard of care of psychiatric patients with schizoaffective disorder might be the proper subject of expert testimony, the standard of care cannot be established merely by citing to an article. *Mielke v. Condell Memorial Hospital*, 124 Ill. App. 3d 42, 54 (1984) (quoting *Fornoff v. Parke-Davis & Co.*, 105 Ill. App. 3d 681, 690-91 (1982)) (calling the rule against substantive use of medical treatises " 'long standing' "). Vinci also relies on the testimony of Balmoral's own nurses regarding schizoaffective disorder, but their testimony only gave a definition of the disorder and did not specifically associate it with violent behavior. In sum, we agree with the trial court that there was no genuine issue of material fact demonstrating that the attack was foreseeable.

¶21 Vinci also claims that Balmoral's destruction of an "endorsement book" in which staff would write incident reports is somehow relevant. The book was kept in loose-leaf form, and written-in pages were removed after a period of time to make room for newer pages. The record does not reveal what, if anything, staff wrote in the endorsement book regarding K.P.'s attack on Vinci. Nonetheless, Vinci conducted exhaustive depositions of Balmoral's administrator and nurses, and had ample opportunity to obtain their testimony regarding what occurred. Before this court, Vinci frames the issue regarding the endorsement book under the rubric of spoliation of evidence, and only by implication does she contend that the missing book provides a basis for reversal of the judgment below. However, spoliation is an independent cause of action and, as such, does not constitute a defense to a summary judgment motion. Vinci not only did not raise the missing endorsement book in her response to the summary judgment motion below, she never amended her complaint to raise any separate spoliation claim. Additionally, her summary judgment response contained no affidavits whatsoever – in particular, no affidavit under Supreme Court Rule 191(b) (Ill. S. Ct. 191(b) (eff. July 1, 2002)) claiming that discovery was incomplete and that further efforts would produce evidence which would tend to defeat summary judgment. See *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 225 (2002) (holding that a party losing a summary judgment motion cannot complain about missing evidence if he failed to submit a Rule 191(b) affidavit). Accordingly, she has forfeited consideration of the issue in this court. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 535-36 (1996).

¶22 Vinci's final claim is that Balmoral improperly relied on certain records to support its motion for summary judgment. On June 13, 2012, on Vinci's own motion, the trial court issued an order

allowing the use of K.P.'s records that were already in the hands of Vinci, but forbidding the use of other records. In sum, the order did not bar witnesses, strike testimony, or in any way restrict the use of evidence the parties already possessed. Because K.P. was not a party to the case, his medical records enjoyed protection from disclosure through discovery. The court entered the order after reviewing K.P.'s medical records *in camera*. Balmoral's motion for summary judgment did not rely on any of K.P.'s records that the order prohibited from disclosure, and the trial court's opinion specifically notes that the motion relied on testimony that was "proper and not prohibited by the July 13, 2012 order." In particular, the permitted evidence included Vinci's own deposition in which she admitted she had no prior contact with K.P. Accordingly, the trial court's order did not rely on improper evidence.

¶ 23 CONCLUSION

¶ 24 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.