

IN THE COURT OF APPEALS OF IOWA

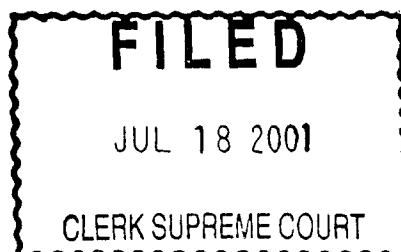
No. 0-770 / 99-838

Filed July 18, 2001

DONNA O'NEAL,
Plaintiff-Appellant,

vs.

ALPINE CENTRE, L.C., and
MONTGOMERY KONE, INC.,
Defendants-Appellees.



Appeal from the Iowa District Court for Scott County, Bobbie M. Alpers,
Judge.

The plaintiff appeals from the district court's rulings granting both
defendants summary judgment. **AFFIRMED IN PART, REVERSED IN PART
AND REMANDED.**

Russell A. Dircks of Dircks, Ridenour and Macek, Davenport, for
appellant.

Roger A. Lathrup and Peter J. Thill of Betty, Neuman and McMahon,
L.L.P., Davenport, for appellee Alpine Centre.

Stuart R. Lefstein and John F. Doak of Katz, Huntoon & Fiewagner, P.C.,
Rock Island, Illinois, for appellee Montgomery Kone.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

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PER CURIAM

Plaintiff Donna O'Neal appeals the district court's grant of summary judgments to defendants Alpine Centre, L.C., and Montgomery Kone, Inc., in this premises liability tort suit, which arose due to an elevator accident. Plaintiff claims summary judgment was not appropriate in either case. Montgomery Kone filed a motion for summary affirmance. We affirm in part, reverse in part and remand.

I. FACTS

Alpine Centre owns a commercial building in Bettendorf, Iowa, and leases space to tenants. The common area of the building, which is under the control of Alpine, has an elevator. On November 15, 1994, O'Neal, a business invitee, was using the elevator when it precipitously dropped from the second floor to the ground. O'Neal was injured in the fall.

At the time of the accident, Alpine Centre had a contract with Montgomery Kone to maintain and service the elevator. In an affidavit, plaintiffs' counsel, Russell A. Dircks, stated that in July 1995, an adjuster for Montgomery Kone, Steve Mettee, told him the company did not have a service contract on the elevator. Based on this representation, plaintiff decided not to bring suit against Montgomery Kone.

On November 14, 1996, O'Neal filed suit against Alpine Centre under a theory of premises liability. On December 12, 1996, after the two-year statute of limitations had run, Alpine Centre's counsel informed Dircks that Alpine Centre had an elevator maintenance agreement with Montgomery Kone. Plaintiff took no further action until January 26, 1998, when she filed an application to amend

the petition to add Montgomery Kone. The district court allowed plaintiff to amend her petition.

II. DECISION IN DISTRICT COURT

A. Alpine Centre

Alpine Centre filed a motion for summary judgment, claiming the alleged dangerous condition of the premises was a hidden or latent defect of which it had no notice, and therefore, no corresponding duty to warn its invitees of the condition. It also pointed out that summary judgment had been granted in December 1998 in a companion case before the district court involving Michael Mays, who was also an occupant of the elevator when it fell.

The district court granted summary judgment to Alpine Centre. The court found that under the doctrine of issue preclusion, the prior litigation involving Mays determined Alpine Centre did not have a duty to warn plaintiff when it had no notice of a defect. The court concluded the doctrine of issue preclusion could be invoked against O'Neal because she was connected in interest with Mays due to the fact both claimed injuries arising from the same event.

B. Montgomery Kone

Montgomery Kone also filed a motion for summary judgment, claiming plaintiff's suit was barred by the statute of limitations. Montgomery Kone recognized the doctrine of equitable estoppel applied to preclude a statute of limitations defense due to Mettee's statements. The company asserted plaintiff's suit should still be barred because it failed to exercise diligence in instituting an action after the grounds for estoppel had expired.

The district court granted the motion for summary judgment. The court concluded plaintiff had not exercised due diligence in commencing suit against Montgomery Kone after the circumstances which gave rise to the estoppel had ceased to operate. The court found that on December 12, 1996, when plaintiff discovered Montgomery Kone had a service contract for the elevator, the circumstances giving rise to the equitable estoppel ceased to exist, but they did not file suit against Montgomery Kone until January 26, 1998. The court found this was an unreasonable delay and constituted lack of due diligence by plaintiff.

O'Neal filed notice of appeal of both summary judgment rulings.¹

III. SCOPE OF REVIEW

We review a district court's summary judgment for errors at law. *Sampson v. American Standard Ins. Co.*, 582 N.W.2d 146, 149 (Iowa 1998). Under Iowa Rule of Civil Procedure 237, summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998). We review the record in the light most favorable to the party opposing the motion. *Ranney v. Parawax Co.*, 582 N.W.2d 152, 153 (Iowa 1998). The burden of showing the nonexistence of a material fact is upon the moving party. *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 14 (Iowa 1999).

IV. MOTION FOR SUMMARY AFFIRMANCE

Montgomery Kone filed a motion for summary affirmance in this appeal, based on our decision in a previous unpublished opinion, *Mays v. Montgomery*

¹ Plaintiff's appeal of the summary judgment for Alpine Centre could properly be made within the time permitted to appeal an order disposing of the rest of the case, in this case the summary judgment for Montgomery Kone. Iowa R. App. P. 5(b); *Davis v. Ottumwa Young Men's Christian Ass'n*, 438 N.W.2d 10, 16 (Iowa 1989).

Kone, No. 99-837 (Iowa Ct. App. Sept. 27, 2000). Iowa Rule of Appellate Procedure 14(e) provides:

Except as otherwise provided by the court's rules, unpublished opinions of the Iowa appellate courts or of any other court may not be cited as authority. For purposes of these rules, "unpublished" opinions means opinions not included or designated for inclusion in the National Reporter System.

Our supreme court rules state:

Citation of Opinions. An unpublished opinion of the court of appeals may not be cited by a court or by a party in any other action or proceeding except when the opinion establishes the law of the case, *res judicata* or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

Iowa Sup. Ct. R. 10(f). See also Iowa R. App. P. 25.

We find summary affirmance is unnecessary, however, and thus, we need not address the issue of whether our previous unpublished opinion could be cited as authority in this case. Whether or not we are bound by our previous decision, we may still reach the same results on the merits in the present case.

V. MONTGOMERY KONE

Montgomery Kone concedes, for the purposes of this summary judgment motion, Mettee's representations would give plaintiff an equitable estoppel defense to the two-year statute of limitations found in Iowa Code section 614.1(2) (1995). Equitable estoppel is a recognized defense to the application of a statute of limitations. *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 157 (Iowa 1984). Equitable estoppel is triggered when false representations induce the plaintiff into inaction to his or her detriment under the statute of limitations. *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 579 (Iowa 1990). Here, we can assume, without deciding, that an equitable estoppel defense applies in this case.

Before the doctrine of equitable estoppel may be successfully invoked, a plaintiff has the duty to exercise reasonable care and diligence. *DeWall v. Prentice*, 224 N.W.2d 428, 430 (Iowa 1997). We turn to the question of whether plaintiff exercised due diligence by delaying the filing of her action against Montgomery Kone after she became aware the company had a service contract for the elevator.

We determine O'Neal's delay in commencing suit against Montgomery Kone was unreasonable. Plaintiff waited more than one year, from December 12, 1996, until January 26, 1998, after finding out Montgomery Kone had a service contract for the elevator which caused the injuries. Plaintiff did not exercise due diligence in initiating an action against Montgomery. We affirm the grant of summary judgment to Montgomery Kone.

VI. ALPINE CENTRE

Plaintiff contends summary judgment for Alpine Centre was not proper. Although not specifically stated, plaintiff is relying on the doctrine of *res ipsa loquitur* to prove negligence. In her brief, plaintiff states:

Elevators, during normal operation, do not fall in the manner that caused this injury. It may be inferred an elevator will not fall if properly maintained, serviced and repaired. Therefore, it may be inferred that simply because the elevator fell, Kone negligently failed to properly maintain, service and repair the elevator.

Alpine is vicariously liable for the negligence of Kone.

Negligence, like any other fact, may be proved by circumstantial evidence. *Brewster v. U.S.*, 542 N.W.2d 524, 528 (Iowa 1996). *Res ipsa loquitur* is one type of circumstantial evidence. *Id.* *Res ipsa loquitur* applies when: (1) the injury is caused by an agent or instrumentality under the exclusive control of the defendant and (2) the occurrence is such as in the ordinary course of events

would not happen if reasonable care had been used. *Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W.2d 739, 743 (Iowa 1977). If there is sufficient competent evidence to generate an inference of negligence under both prongs of the *res ipsa loquitur* doctrine, summary judgment is not appropriate. *Welte v. Bello*, 482 N.W.2d 437, 440 (Iowa 1992).

We find there is sufficient evidence to generate a jury question on the issue of whether O'Neal's injury was caused by an agent or instrumentality under the exclusive control of Alpine Centre. The duty of a possessor of land to keep the premises in a reasonably safe condition for business invitees is a non-delegable duty. *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 703 (Iowa 1995). The liability of a possessor of land is the same whether the possessor maintained the premises itself or hired an independent contractor to do so. *Id.* (citing Restatement (Second) of Torts § 425 (1965)). Alpine Centre, the owner, hired a company to service the elevator, but still had a duty to keep the premises in a reasonably safe condition.

We find there is also sufficient evidence to generate a jury question on the issue of whether the occurrence (falling elevator) was such as in the ordinary course of events would not happen if reasonable care had been used. *Res ipsa loquitur* may be applied to unusual events, such as a falling elevator. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 39, at 244-45 (5th ed. 1984). See Restatement of Torts (Second) § 328D cmt. 3 (1963) (*res ipsa loquitur* may apply to event such as the fall of an elevator).

Summary judgment was not proper in this case. There is sufficient evidence to create genuine issues of material fact on both prongs of the doctrine

of res ipsa loquitur. We reverse the decision of the district court and remand for further proceedings.

VII. DISPOSITION

We affirm the district court decision granting summary judgment to Montgomery Kone on the ground plaintiff's suit is barred by the statute of limitations. We reverse the summary judgment for Alpine Centre and remand for further proceedings. We assess costs one-half to plaintiff and one-half to Alpine Centre.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.