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2015 IL App (1st) 141853-U

SIXTH DIVISION
March 20, 2015

No. 1-14-1853

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SAMANTHA WILSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 13 L 001982
	)	
ROBERT A. BECHTEL, Individually, and	)	
SHADES OF DARKNESS TANNING	)	
SALONS, INC.,	)	Honorable
	)	John Ehrlich,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

- ¶ 1. *Held:* We reversed the grant of summary judgment in favor of defendants on plaintiff's negligence action, where genuine issues of material fact existed regarding whether defendants adequately warned plaintiff of the danger of tanning in their salon without using protective eyewear, and whether defendants failed to require plaintiff to use protective eyewear.
- ¶ 2. Plaintiff, Samantha Wilson, filed a negligence action against defendants Robert A. Bechtel (Bechtel) and Shades of Darkness Tanning salons, Inc. (salon) related to an injury to her right eye she allegedly suffered while using a tanning bed at the salon. The circuit court granted summary judgment in favor of defendants on plaintiff's complaint. Plaintiff appeals, contending questions of material fact preclude the grant of summary judgment. We reverse and remand.

¶ 3

I. Background Facts

¶ 4 In her complaint, plaintiff alleged that on May 5, 2009, and May 8, 2009, she was a customer at the salon, and on each occasion used one of its tanning beds. The salon is owned, operated, and managed by Bechtel. Plaintiff alleged that on May 5, 2009, and May 8, 2009, defendants committed one or more of the following negligent acts or omissions: (1) failed to warn plaintiff of the hazards of ultraviolet lights and the need to use protective eyewear while using the tanning bed; (2) failed to require plaintiff to use protective eyewear in violation of section 25 of the Tanning Facility Permit Act, 210 ILCS 145/25 (West 2008); (3) failed to post a warning sign advising plaintiff she must use protective eyewear in violation of section 795.150 of the Tanning Facilities Code, 77 Ill. Adm. Code § 795.150; (4) failed to adequately advise plaintiff of the risk of serious and permanent damage to eyes and vision as a result of using tanning facilities; and (5) were "otherwise careless and negligent." As a result of one or more of these negligent acts, plaintiff allegedly suffered an injury to her right eye.

¶ 5 Discovery depositions were taken of plaintiff, Bechtel, and Brandy McBride, a manager at the salon at the time of plaintiff's alleged injury.

¶ 6

A. Plaintiff's Discovery Deposition

¶ 7 Plaintiff testified in her discovery deposition that she went to the salon to tan only two times, on either May 5 or May 6, and on May 8, 2009. She knew friends who had tanned there, as well as her sister Rebecca. Plaintiff had never been to a tanning salon prior to May 2009 and knew nothing about the need to use protective eyewear.

¶ 8 On the first day she went into the salon (either May 5 or May 6, 2009), an employee asked her how old she was. When plaintiff replied that she was 17, the employee told her she needed permission from an adult in order to use the tanning beds. Plaintiff went home and wrote

out on a sheet of white paper, "I allow my daughter, Samantha Wilson, to go tanning at Shades of Darkness." Plaintiff had her mother sign the paper (permission slip).

¶ 9 On May 8, plaintiff returned to the salon, walked up to the counter in the front room, and gave the employee the permission slip. The employee "signed [her] into the system on the computer." The employee asked plaintiff if she had "goggles" and plaintiff said no. That was the extent of their conversation with regard to eyewear; the employee never told plaintiff she could not tan without eyewear. The employee then led plaintiff into the tanning room, and she tanned without using any eyewear.

¶ 10 Plaintiff testified she saw no notices posted on the countertop in the front room of the salon. Counsel showed plaintiff's exhibit number 4, a notice which read, "Attention! We need to see your eye protection every time you tan! This is a state law! It is for your protection as well as ours! Thank you for understanding!" Plaintiff did not recall seeing that notice on the countertop or anywhere else in the salon.

¶ 11 Counsel showed plaintiff's exhibit numbers 2 and 3, which are sign-in sheets dated May 6, 2009, and May 8, 2009, both of which state:

"By signing this sheet I agree:

-to wear protective eyewear

-that I have not tanned in the last 24 hours

-that I am not on any new medication that could cause sensitivity to sunlight."

The sign-in sheets each contain a list of signatures. Plaintiff's name is signed on line 7 on the May 6 sign-in sheet, and on line 4 on the May 8 sign-in sheet. However, plaintiff testified neither of those signatures was hers and that they do not even look like her handwriting. Plaintiff testified she did not sign either sign-in sheet on May 6 or May 8.

¶ 12 Counsel showed plaintiff's exhibit number 1, which is an application to tan at the salon, dated May 6, 2009. The top of the application contains a box with plaintiff's name, address, phone number and birthday. The middle of the application contains certain printed warnings, including that plaintiff must: "Wear appropriate protective eyewear," and "FAILURE TO USE APPROPRIATE EYEWEAR MAY RESULT IN SEVERE BURNS AND/OR LONGTERM INJURY TO THE EYES." Plaintiff's signed name is at the bottom of the application.

¶ 13 Plaintiff testified she did not fill out the box at the top of the application, and that her birthday, listed on the application as January 2, 1991 is incorrect, as she was actually born in 1992. Plaintiff testified the signature on the bottom of the application was not hers and that she has never even seen that application.

¶ 14 Plaintiff testified that when she entered the tanning room on May 8, 2009, the lighting inside was "dim." Plaintiff answered no when asked whether the lighting was "adequate in there [to] see around the room." Plaintiff did not recall seeing any notices or written materials posted on any of the walls in the tanning room or on the tanning bed. Plaintiff stated: "There might have been a sign on the wall, not that I remember really. You don't really look around when you go in there. You are timed." Plaintiff had 15 minutes to use the room.

¶ 15 About two or three days after tanning in the salon, plaintiff noticed some blurriness in her right eye. Plaintiff went to the eye doctor, who examined her and told her she had permanent damage to her right eye, that the retina had been burned and that there was scarring. A specialist subsequently gave her the same diagnosis.

¶ 16 The blurriness in her right eye especially bothers her when she is driving, as she cannot read street signs, and it also bothers her when she is reading from the computer, as she gets headaches and sees "floaters". Her vision is even worse at night than it is during the day because

her pupils are more dilated; at night, the images she sees in her right eye look like a "wavy mirror."

¶ 17

B. Bechtel's Discovery Deposition

¶ 18 Bechtel testified in his discovery deposition that he is the owner of the salon and that Brandy McBride was the salon's manager in 2009. According to computer records, Brandy was the employee who spoke with plaintiff during her two visits to the salon in May 2009. Bechtel has asked Brandy if she recalls speaking with plaintiff, but Brandy does not remember her.

¶ 19 Bechtel testified that his computer records show plaintiff tanned in room 5 at the salon on May 6, 2009, and she tanned in room 9 at the salon on May 8, 2009. Room 5 is on the upstairs level while room 9 is on the downstairs level. The tanning beds in those two rooms are "Level 1" beds, which are the beds with the lowest level of radiation.

¶ 20 Bechtel testified that a 3-foot-by-3-foot sign "in flaming neon orange colors and yellow colors" is attached to the back of the door to each of those rooms; which states: "DANGER. ULTRAVIOLET RADIATION." The sign further states: "Wear protective eyewear. FAILURE TO USE PROTECTIVE EYEWEAR MAY RESULT IN SEVERE BURNS OR LONG-TERM INJURY TO THE EYES." Further, each tanning bed "also has the identical information that the signs on the wall has *** just in smaller writing."

¶ 21 Bechtel explained that when a new customer comes into the salon, she signs in at a counter upon which is a written notice which warns tanners of the need to wear protective eyewear. The sign-in sheet itself states that the customer agrees to wear protective eyewear. An employee discusses the pricing and packages offered and hands the customer an application, which includes the printed warning that appropriate protective eyewear is required for tanning. If the customer does not have her own eyewear, the salon sells her disposable eyewear (called

"Winkies") for 50 cents. After the customer signs the application, the employee takes her to a tanning room, and shows her how to use the eyewear and how to start the tanning bed.

¶ 22 Bechtel stated that occasionally, when a customer has neglected to sign the sign-in sheet, he has signed the sheet for him/her. Bechtel is "sure" Brandy has also occasionally signed the sign-in sheet for a customer. Bechtel stated that clients generally are not given a copy of the written warnings to take home with them.

¶ 23 C. Brandy's Discovery Deposition

¶ 24 Brandy McBride testified in her discovery deposition that she was a manager at the salon in 2009. She does not recall helping plaintiff.

¶ 25 Brandy testified that new customers of the salon fill out an application, which includes language warning them of the need to wear protective eyewear. First-time clients have to show that they have eyewear, otherwise the salon sells them either goggles or disposable eyewear for 50 cents prior to entering the tanning rooms. Eyewear is not kept in the tanning rooms. Brandy testified consistently with Bechtel regarding the presence of signs on the front check-in counter and on the back of the doors of the tanning rooms that convey warnings about the need to wear protective eyewear. Brandy also testified that customers generally are not provided with a copy of the written warnings to take home with them.

¶ 26 D. Summary Judgment Proceedings

¶ 27 Defendants filed a motion for summary judgment. In the summary judgment motion, defendants argued that plaintiff's complaint alleged that defendants had: (1) negligently failed to adequately warn her of the risk of injury to her eyes of tanning without protective eyewear; and (2) negligently failed to post required warnings regarding the danger of tanning without protective eyewear. Defendants argued that the deposition testimony of Bechtel and Brandy

established that multiple warnings regarding the danger of tanning without protective eyewear were posted throughout the salon, but that plaintiff failed to read those warnings. Defendants contended that any inadequacy in those warnings cannot be the proximate cause of her injury where plaintiff admittedly never read those warnings, and therefore that summary judgment should be granted in defendants' favor.

¶ 28 A hearing was held on defendants' summary judgment motion; the transcript of the hearing is not contained in the record on appeal. The circuit court entered a written order on February 3, 2014, granting defendants' motion for summary judgment. On May 20, 2014, the circuit court entered a written order denying plaintiff's motion for reconsideration. Plaintiff timely filed her notice of appeal on June 12, 2014.

¶ 29

II. Analysis of Plaintiff's Appeal

¶ 30 Plaintiff contends the circuit court erred in granting defendants' summary judgment motion. "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 there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *County of Cook v. Village of Bridgeview*, 2014 IL App (1st) 122164, ¶ 10. Our review of the circuit court's order granting summary judgment is *de novo*. *Id.*

¶ 31 Plaintiff need not prove her case at the summary judgment stage, but she must present some factual basis supporting each element of her cause of action. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. In a negligence action, plaintiff must plead and prove that defendants owed her a duty, defendants breached that duty, and that the breach proximately caused plaintiff's injury. *Id.*

¶ 32 Plaintiff alleged that defendants owed her a duty pursuant to the Tanning Facility Permit Act (Act) (210 ILCS 145/25 (West 2008)), and the Tanning Facilities Code (Code) (77 Ill. Adm. Code § 795.150), to warn her of the need to use protective eyewear while tanning. The Act provides in relevant part:

"Each tanning facility shall have on hand at all times an operator adequately trained in the correct operation of the facility so as to be able to inform and assist the public in its proper use. Each operator shall perform the following functions as a precondition to the public having access to the tanning facility being made to the public:

(b) The operator shall require each person desiring to use a tanning facility to use protective eyewear.

(f) The operator shall give each person using the facility a written copy of the warning required under subsection (h) of Section 20 of this Act prior to each person's use of the facility."¹ 210 ILCS 145/25 (West 2008).

¶ 33 The Code provides in pertinent part that each tanning facility shall have a "readily legible, clearly visible" warning sign "conspicuously posted" within three feet of each piece of tanning equipment that warns tanners of the need to wear protective eyewear and that the failure to wear protective eyewear may result in severe burns or long-term injury to the eyes. 77 Ill. Adm. Code § 795.150.

¹ The warning states: "DANGER-Ultraviolet radiation. Follow instructions. As with natural sunlight, overexposure can cause eye injury and sunburn, repeated exposure may cause premature aging of the skin and skin cancer. Medications or cosmetics applied to the skin may increase your sensitivity to ultraviolet light. Consult a physician before using lamp if taking any medication or if you believe yourself especially sensitive to sunlight." 210 ILCS 145/20 (h) (West 2008).

¶ 34 Defendants do not dispute that they owed a duty to plaintiff under the Act and the Code to warn her of the need to wear protective eyewear while tanning. Defendants argue, though, that the deposition testimony of Bechtel and Brandy establish that the requisite warnings were given to plaintiff in writing on the application to tan, on the sign-in sheets, and on the front counter in the reception area, and were posted on the door, walls and tanning bed inside the tanning room itself. Defendants further argue that plaintiff failed to read any of those warnings and, thus, that any inadequacy in those warnings was not a proximate cause of her injury.

¶ 35 In support, defendants cite *Kane v. R.D. Werner Co., Inc.*, 275 Ill. App. 3d 1035 (1995). The plaintiff in *Kane* was climbing an extension ladder when he fell and injured himself. *Id.* at 1035. The plaintiff brought an action against the manufacturer of the ladder, alleging it failed to give adequate warnings as to the dangerous propensities of the ladder and the safe and proper use of the ladder. *Id.* Noting that the plaintiff had admitted he never read the warning labels attached to the ladder, the appellate court affirmed the grant of summary judgment in favor of the manufacturer, holding that any inadequacy in a warning is not a proximate cause of the plaintiff's injuries where the plaintiff never read the warning, unless the nature of the alleged inadequacy is such that it prevents him from reading it. *Id.* at 1037.

¶ 36 In the present case, plaintiff testified in her deposition that she was prevented from reading any of the alleged warnings about the need to use protective eyewear because they were either never shown to her or because they were not prominent enough to be seen in the dimly lit tanning room which she was allowed to use for only 15 minutes. Specifically, plaintiff testified that she never saw the application to tan purportedly containing her signature, that the birth date contained on the application was inaccurate and that the signature on the application was not hers. Plaintiff testified she never saw any warning notices on the front counter in the reception

area, that she did not sign the sign-in sheets for the days she visited the salon, and that although both sign-in sheets contain her purported signature, neither of those signatures was hers and they did not look like her handwriting. Plaintiff testified that the salon employee asked her if she had goggles, and plaintiff said no; they engaged in no further conversation regarding eyewear. The employee led plaintiff into the tanning room. Plaintiff testified she did not recall seeing any warning signs on the walls inside the tanning room or on the tanning bed. Plaintiff stated that although there "might" have been a sign on a wall inside the tanning room, the lighting was dim and not adequate enough to allow her to "see around the room" and she also did not have time to look around the room because she only had 15 minutes to use the tanning bed.

¶ 37 Plaintiff's deposition testimony raises genuine issues of material fact regarding whether defendants gave her *any* oral or written warnings regarding the need to wear protective eyewear prior to entering the tanning bed as required by the Act. Plaintiff's deposition testimony also raises a genuine issue of material fact regarding whether the written warnings, if any, on the wall, door and bed inside the tanning room were clearly visible and conspicuously posted within three feet of the tanning equipment as required by the Code so as to be adequately seen and read inside the dimly lit room while plaintiff was under a 15-minute time constraint to use the tanning bed. Given these genuine issues of material fact regarding whether defendants breached their duties under the Act and the Code to warn plaintiff of the need to wear protective eyewear prior to tanning, and whether the inadequacy of any written warnings inside the tanning room prevented plaintiff from reading them and proximately caused her injury, we reverse the grant of summary judgment in favor of defendants on plaintiff's failure-to-warn allegations and remand for further proceedings.

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We further note that, in addition to the failure-to-warn allegations in her complaint, plaintiff also alleged that defendants negligently failed to *require* her to use protective eyewear in violation of the Act. Plaintiff testified at her deposition that the salon employee asked her whether she had goggles, plaintiff said no, and no further discussion was had regarding eyewear. The employee led plaintiff into the tanning room without any eyewear; Brandy testified that no eyewear was provided inside the tanning room. Plaintiff tanned without wearing any eyewear and suffered injury to her right eye. This testimony raises a genuine issue of material fact regarding whether defendants failed to require plaintiff to use protective eyewear prior to tanning and whether this failure proximately caused plaintiff's injury. Accordingly, we reverse the grant of summary judgment and remand for further proceedings on plaintiff's allegation that defendant failed to require her to use protective eyewear in violation of the Act.

¶ 38 Reversed and remanded.