STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Bryant K. Creighton, Sr. and Beth A. Creighton,
Plaintiffs Below, Petitioners

vs.) No. 11-0576 (Ohio County 09-C-181)

Cecelia Visnic,
Defendant Below, Respondent

FILED
September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Bryant K. Creighton, Sr. and Beth A. Creighton appeal the circuit court's January 4, 2011 order granting Respondent Cecelia Visnic summary judgment in a case where steps on respondent's property collapsed and Mr. Creighton fell as a result. Petitioners argue that respondent did not act reasonably in not replacing the steps in spite of a prior conversation with a contractor. Upon consideration of the standard of review, the record on appeal, and the briefs of the parties, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision is appropriate under Rule 21(d) of the Revised Rules of Appellate Procedure.

On or about October 19, 2007, Mr. Creighton, while working as a meter reader for American Electric Power, was walking down wooden steps on respondent's property when the steps collapsed and Mr. Creighton fell. Petitioners subsequently filed suit against respondent for monetary damages.[1]

As reflected in the circuit court's order, respondent filed a motion for summary judgment asserting that respondent "did not breach her duty of reasonable care under the circumstances because [respondent] used the subject stairs everyday and there was no indication that a problem existed with the steps." *See* Syl. Pt. 4, in part, *Mullet v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999) ("[L]andowners or possessors now owe any non-trespassing entrant a duty of reasonable care under the circumstances."). In addition, respondent asserted that "[Mr. Creighton] used the steps on a regular monthly basis and admitted that there was no reasonable hazard with regard to the steps." Respondent further asserted that she did not violate any health and safety codes or industry standards.

[1] Mrs. Creighton's claim was one for loss of consortium.

In their response to respondent's motion for summary judgment, petitioners asserted that "[respondent] spoke to a contractor about replacing the subject steps three years before they collapsed." *See* Syl. Pt. 5, *Mullet*, supra. ("The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary [woman] in the defendant's position, knowing what [she] knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?") (quoting Syl. Pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988)). Petitioners further asserted that the steps were in a wet area, looked old, and were of an uncertain age.

The circuit court granted respondent summary judgment, making the following conclusions of law:

> 3. [Mr. Creighton] admitted in his deposition that he had used the subject steps, in his position as a meter reader, approximately ninety times during his monthly route, including the month before the subject accident. Mr. Creighton also admitted in his deposition that he did not notice any problems with the steps, nor did he notice that the steps were unstable, or rickety. Mr. Creighton further testified in his deposition that he would have reported any problems with the steps to his company, but he did not notice any.
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> 4. [Respondent] testified in her deposition that she used the steps everyday and never noticed any problems.
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> 5. The Court finds that the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issues as to any material fact and that [respondent] is entitled to judgment as a matter of law. The Court further finds that the record taken as a whole could not lead a rationale [sic] trier of fact to find that [respondent] breached the duty of reasonable care owed to [Mr. Creighton] and that it was foreseeable that the steps would collapse.
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> 6. The Court finds that [Mr. Creighton] failed to put forth sufficient evidence that [respondent] breached her duty of reasonable care to [Mr. Creighton] or violated any health and safety codes and thus failed to establish a prima facie case. Further, the Court finds that [Mr. Creighton] did not offer more

> than a scintilla of evidence in opposing the Motion for Summary Judgment and thus failed to satisfy the burden of proof required. The fact that [respondent] spoke to a contractor about the steps years before the accident and the assertion that were in a wet area, looked old, and were of an uncertain age is not more than a scintilla of evidence and would not allow for a reasonable jury to find it its [sic] favor.

Petitioners appealed pro se the circuit court's grant of summary judgment to this Court.[2]

On June 14, 2011, respondent filed a motion to strike petitioners' appendix, asserting that it "contain[ed] several papers and exhibits that were not submitted to the Circuit Court." This Court granted the motion and ordered that petitioners file an appendix "that contains only documents that were part of the lower court record." Petitioners subsequently filed an appendix compliant with this Court's order. Respondent filed a supplement appendix.

On appeal, petitioners assert that respondent talked to contractor William Stewart about replacing the steps three years before they collapsed causing Mr. Creighton to fall and that respondent knew or should have known that the steps would eventually collapse.[3] Petitioners further assert that Mr. Creighton's admission that the steps were not noticeably unsafe related only to the day of the accident. Therefore, petitioners argue that summary judgment in respondent's favor should be reversed and the case remanded for further proceedings.

Respondent argues that the circuit court properly found that she spoke to Mr. Stewart about the steps years before Mr. Creighton's fall but that such evidence did not create a genuine issue of material fact. Respondent notes that she testified at her deposition that "[the steps] was [sic] fine when I go up and down them." Respondent also notes Mr. Creighton's admission that he did not find the steps noticeably unsafe either. Respondent argues that the questions that formed the basis for Mr. Creighton 's admission demonstrate that they were in no way limited to the time immediately prior to his fall, i.e., the questions inquired about the entire period of Mr. Creighton's monthly route checking electric meters from 2001 to 2007 (when he used the steps approximately ninety times). Respondent argues that the circuit court properly granted her summary judgment on petitioners' claim that she was negligent.

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[2] Petitioners had representation during the proceedings in the circuit court.

[3] Mr. Stewart was on respondent's property three years prior to Mr. Creighton's fall to repair a fence.

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In Syllabus Point One, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), this Court held that "[a] circuit court's entry of summary judgment is reviewed *de novo*." The record on appeal includes excerpts from the depositions of respondent, Mr. Creighton, and Mr. Stewart. After careful review of the transcripts, this Court concludes that the circuit court did not err in granting respondent summary judgment on petitioners' claim that she was negligent.

For the foregoing reasons, we find no error in the decision of the circuit court and the summary judgment in respondent's favor is affirmed.

Affirmed.

ISSUED: September 4, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh