STATE OF MICHIGAN

COURT OF APPEALS

DYAR SALMO,

Plaintiff-Appellant,

v

SEAFOOD OF DETROIT, LLC, doing business as JOE MUER SEAFOOD,

Defendant-Appellee.

UNPUBLISHED
February 20, 2020

No. 347488
Wayne Circuit Court
LC No. 17-013636-NO

Before: SHAPIRO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff, Dyar Salmo, appeals as of right the order granting summary disposition under MCR 2.116(C)(10) in favor of defendant, Seafood of Detroit, LLC, doing business as Joe Muer Seafood. We affirm.

I. RELEVANT FACTUAL BACKGROUND

On May 20, 2017, plaintiff and her family were attending a First Holy Communion celebration, hosted by plaintiff's sister and brother-in-law, Sheldon and Angela Yono, at defendant's restaurant in Detroit, Michigan. After the party had begun, the Yono family requested a speaker and microphone so that the children could thank everyone for attending, and say grace. Defendant's co-owner, John Vicari, had set up the stand for the speaker when he realized he was missing the speaker's power cord. Vicari left the private room where the party was taking place to obtain the cord. While Vicari was gone, Sheldon Yono put the speaker on the stand and walked away. Sometime thereafter, the speaker fell forward, striking and injuring plaintiff, who had been seated at a table.

II. WAIVER OF APPELLATE REVIEW

Plaintiff's sole issue on appeal is whether the trial court erred by granting summary disposition to defendant where the doctrine of res ipsa loquitur applies to the facts of this case.

"In order to properly preserve an issue for appeal, it must be raised before, and addressed and decided by, the trial court." *Henderson v Dep't of Treasury*, 307 Mich App 1, 7-8; 858 NW2d 733 (2014). This issue was raised for the first time in a motion for reconsideration, and therefore it is not properly preserved for appellate review. See *Dep't of Environmental Quality v Morley*, 314 Mich App 306, 316; 885 NW2d 892 (2015) (citation omitted), where this Court concluded that "[b]ecause [this issue was raised] for the first time in a motion for reconsideration, the argument is not preserved."

Despite plaintiff's assertion to the contrary, the applicability of the doctrine of res ipsa loquitur to the facts of this case was raised for the very first time in a timely motion for reconsideration of the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). After the trial court summarily dismissed this case, plaintiff obtained new counsel, who filed a motion for reconsideration, arguing that the trial court had failed to "analyze or otherwise apply the legal Doctrine of Res Ipsa Loquitur[.]" Plaintiff's motion for reconsideration was denied.

Now, plaintiff cursorily argues in her appellate brief that this issue was argued by her first counsel in the trial court; the doctrine was just not identified by name. However, plaintiff fails to provide any record citations to where the theory was actually advanced. Indeed, in her response to defendant's motion for summary disposition, plaintiff proceeded under a theory of premises liability, arguing that defendant had breached its duty to her, as a business invitee, by failing to inspect the speaker, and failing to warn plaintiff of any defect. Plaintiff also argued the foreseeability of injury resulting from a speaker that had been negligently erected. Plaintiff's counsel argued consistently with plaintiff's brief at a hearing on defendant's motion for summary disposition. Our review of the record before us requires the conclusion that the doctrine of res ipsa loquitur was not raised prior to plaintiff's motion for reconsideration.

In *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008), our Supreme Court explained:

> Michigan generally follows the "raise or waive" rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal.
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> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [Footnotes omitted.]

By failing to raise the applicability of the doctrine of res ipsa loquitur, plaintiff has waived appellate review.

We acknowledge that this Court may waive preservation requirements "to review an issue not raised in the trial court to prevent a miscarriage of justice," *Walters*, 481 Mich at 387, when consideration is necessary to properly determine the case, or when the issue is a question of law and the facts necessary for the resolution have been fully presented. *Smith v Foerster-Bolser Constr, Inc.*, 269 Mich App 424, 427; 711 NW2d 421 (2006). However, our Supreme Court has cautioned that appellate courts should exercise such discretion sparingly, and only under exceptional circumstances. *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987). No such exceptional circumstances exist here. Plaintiff could have raised this issue in a timely fashion, yet for whatever reason failed to do so. We therefore consider this issue waived.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Michael J. Kelly