STATE OF MICHIGAN

COURT OF APPEALS

GLADYS CUNNINGHAM,

Plaintiff-Appellant,

v

MICHIGAN HEALTHCARE PROFESSIONALS, P.C. d/b/a MICHIGAN WOMENS HEALTH, and TOP DRAWER DESIGN, INC.,

Defendants,

and

DIMITRIE UPHOLSTERING, INC.,

Defendant-Appellee.

UNPUBLISHED
April 29, 2021

No. 354236
Oakland Circuit Court
LC No. 2019-173891-NO

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

This negligence action involves a defective chair in a doctor's office waiting room. A patient was injured when the chair collapsed. She sued the doctor's office, an interior designer, and the reupholstery company that had recently changed the fabric on the chair. The office and the designer are no longer parties to the action. Because the patient presented no evidence that the reupholstery company caused or exacerbated a defect, the circuit court summarily dismissed the only remaining claims. We affirm.

I. BACKGROUND

Gladys Cunningham visited her gynecologist's office for a check-up on the morning of Monday, July 18, 2016. In the waiting room, Cunningham sat on a middle chair in "[a] row of chairs connected together." Another client was sitting on the other end of the row. "The very first chair" had a sign indicating "do not sit. Chair broken." When the other woman stood up, "the thing just fell in. The chairs just broke." Cunningham described, "I just know the chairs broke and my knees went to my chest. I heard my knees click." Right after her fall, Cunningham heard

a doctor say that "they should have removed the whole damn row. If one seat broke, the whole row broke."

Shortly before the accident, two healthcare practices merged to form Michigan Healthcare Professionals, PC (MHP). One practice moved into the office space of the other. MHP contracted with Top Drawer Design, Inc. to do interior design work for the merged practice. Top Drawer subcontracted with Dimitrie Upholstering, Inc. (DU) to reupholster the chairs in MHP's waiting room, chairs that had been moved from the new partner's old office a few weeks earlier. Some of the chairs were connected in five-seat rows. Here is a configuration of a "five-seater":

Dennis Dimitrie and Alexander Harvey picked up the subject five-seater from MHP. They did not take the bench apart; instead, they "used furniture dollies, one on each end, and rolled it" out to the truck. The men lifted the 100-pound bench by the arms, placed it on the dollies, and then lifted it off the dollies and into the truck using "[j]ust brute strength." MHP's offices were on the first floor and the men were not required to navigate any steps or elevators.

There is a metal cylinder underneath the seats on the five-seater. Each seat is attached to the cylinder by a metal plate that is welded to the cylinder. The seat is attached to the plate by four screws and bolts. Here is the attachment mechanism:

During reupholstery, DU employees unscrewed the seats and removed them from the metal plate. DU did not take apart the cylinder as this was not required to complete the job. But Harvey noted that there were holes in the cylinder and a "little silver rod" could be seen inside. DU did not test the structural integrity of the furniture, "it wasn't any part of the job."

Dimitrie, Harvey, and another DU employee named Mark made many trips to MHP to pick up and drop off seats. This specific five-seater was returned to MHP's office on Thursday, July 14, 2016. On one of his many visits, Harvey observed a paper sign on a single seat on a five-seater bench, warning clients not to sit there. This was a five-seater that had already been reupholstered and returned by DU. However, Harvey was not sure if the sign appeared before or after Cunningham's accident.

Dr. Hamid Banooni came into the waiting room after Cunningham's fall. He observed that the end chair had separated from the remainder of the bench and the two sides had collapsed. Dr. Banooni claimed that the seat was in perfect condition when it was moved to the practice. He continued that this specific bench had just been reupholstered and returned to the office "the day of business before the incident happened," the Friday before Cunningham's Monday appointment. However, Banooni admitted he had no documentation to prove that statement. Dr. Banooni was unaware of any sign on the bench before Cunningham's accident. However, the doctor claimed that he "saw a couple of bolts that had been loose," although he did not remember if the bolts were on the floor or still attached to the seating system in some way.

After the incident, Top Drawer asked DU to repair the five-seater. Dimitrie testified that the cylinder underneath the seats was made up of attached segments. Two of those cylinder segments had come apart, causing Cunningham to fall. But Dimitrie observed no screws or bolts on the floor near the seat. Inside the cylinder was a four-inch rod. To repair the issue, Dimitrie placed a 12-inch rod inside the cylinder for extra support and then reattached the segments. Dimitrie inserted screws through the cylinder and into the rod to hold the pieces in place. Dimitrie emphasized that he and his team removed screws from the plates, not the cylinder connections, when reupholstering the seats.

Cunningham filed suit seeking recovery for her injuries from MHP, Top Drawer, and DU. She accused DU of failing to exercise reasonable care in upholstery or reupholstery of the chair and failure to warn of a known danger. She also raised counts of products liability.

In blaming DU for the defective condition of the seat, Cunningham hung her hat on the following testimony given by Harvey:

> *Q.* Okay. At any point in the process we just spoke about did the five seat unit or any of the five seat units twist at all, meaning two cylinders, because I understand there's two tubes, two metal cylinders, somewhere between two of the seat[s]; did you ever notice any twisting of the five seat unit?
>
> *A.* Yes, I did.
>
> *Q.* Tell me what you mean by twisting?
>
> *A.* They turn. There's a tube, a circular tube, probably about three inches maybe in diameter.
>
> *Q.* Is that what runs under all the seats?
>
> *A.* Yes.

Q. And so when did you notice this turning or twisting?

A. Probably - - probably when we lifted it maybe.

* * *

Q. Yeah. Okay. So you told me at least at one of the points you noticed a turning or a twisting of the tubular section that ran under the five seat units when you lifted it up from the doctor's office?

A. Uh-huh [yes].

DU sought summary disposition, contending that Cunningham's "theory of liability is that one or more of the defendants created and/or knew of an alleged defect in the furniture but failed to warn" her. But, DU urged, Cunningham presented no admissible evidence to support that DU caused the defect or knew about it. First, DU noted, it did not design, manufacture, or sell the subject five-seater. DU contended that it did not have a duty to inspect the five-seater for potential defects; it was hired only to reupholster the fabric seats.

DU further asserted that it owed no duty to Cunningham. DU had a contractual duty to Top Drawer to reupholster the seats. Cunningham was not a party to that contract and could assert a tort claim against DU only if she established that DU owed her a duty separate and distinct from DU's contractual duties. No separate legal duty existed as DU had no relationship with Cunningham except through "an extremely attenuated series of events." In any event, DU did not contractually accept any duty in relation to the frames of the seating systems. Even if there were a relationship between the parties, DU contended that Cunningham's injury was not foreseeable. DU did not disassemble the frame or take any other action that could have caused the collapse. "The mere occurrence of a fall (or the collapse of a chair) is not sufficient to raise an inference of negligence, and any argument to the contrary is pure speculation and conjecture which cannot defeat a motion for summary disposition."

Beyond the lack of duty, DU contended that there was no evidence that it was negligent. DU noted the lack of evidence "as to what caused the chair to collapse," let alone something DU had done. There was no evidence that DU knew of the defect either. Neither the doctor's comment nor the sign on the chair could connect knowledge to DU. "All that [Cunningham] is left with is a temporal relationship between (a) [DU's] reupholstery of the chair and its placement in the waiting room at [MHP], and (b) [Cunningham's] alleged injury." However, "a mere temporal relationship is insufficient to establish causation."

DU predicted that Cunningham would claim DU was liable under the theory of res ipsa loquitor. Even under that theory, DU argued, "the mere occurrence of an accident does not establish negligence." There must be some evidence that the accident would not have occurred without some negligence on the defendant's part. The chair could have collapsed due to Cunningham's own negligence of choosing to sit on a bench marked with a warning sign.

In response to DU's motion, Cunningham described:

> This case arises out of an incident where employees of [DU] removed a 12 ft row of chairs weighing in at over a hundred pounds, worked on the row and returned it to the office. The very next business day after they returned the row of chairs, as Plaintiff Cunningham and another person had been sitting on the chairs, the chairs separated and broke, sending Ms. Cunningham to the floor and caused her severe injuries. . . . [DU] employee, Alexander Harvey Jr. testified that the chairs were moved using just two people and sheer force. He further testified that he noticed in the course of moving the chairs that the connection of the chairs had twisted. Dennis Dimitrie admitted in his deposition that they were the last ones to move the furniture. Despite that [DU] employees noticed during the moving of the chairs that the chairs had broken, [DU] never informed anyone and put the chairs back in the office which proved to be a trap for those [who] would sit on it.

Ultimately, DU knew the chairs twisted when moving, and it was foreseeable that they would twist and break when someone sat on them.

Cunningham contended that DU owed her and all third parties a duty separate and distinct from its contract with Top Drawer to use ordinary care in its endeavors to avoid harming others. DU breached that duty by moving the heavy chairs "with no special equipment and no professional movers," using only "a dolly and [the] 'sheer force' of its two employees." Moreover, the upholstery work required disassembling the seats. Yet, DU never inspected the chairs to make sure their work did not cause harm, and then did not remedy the new defect they created.

Finally, Cunningham relied on the doctrine of res ipsa loquitor to support an automatic inference of negligence. Cunningham asserted that "a row of chair[s] does not generally separate and collapse unless someone negligently broke it." The five-seater was in DU's "exclusive control" until the end of the last business day before the accident and was in perfect condition before then. In the course of DU moving the five-seater, the seats twisted. Only DU could know how the chair broke.

DU retorted that Cunningham claimed DU broke the five-seater while moving it, but failed to cite any real evidence in support, relying on "impermissible speculation, conjecture, and hearsay." DU did not fail to use proper moving equipment; it employed furniture dollies to transport the five-seater to the truck. The fact that the frame was "twisting" during the move was not evidence that it broke, let alone that DU had notice that it broke. The frame did not separate and there is no evidence that it was damaged or weakened. DU further contended that Cunningham could not establish that the five-seater was in perfect working order before DU moved it for reupholstering. Cunningham relied on Dr. Banooni's deposition testimony. However, Dr. Banooni's partners had only recently brought the five-seater from their separate practice and Dr. Banooni relied on their hearsay statements regarding the seat's condition. Moreover, Dr. Banooni described that he was not mechanically inclined and therefore could not make a personal assessment of the functionality of the seat.

The circuit court summarily dismissed Cunningham's claims against DU on March 29, 2020. The court first determined that Cunningham's products liability claim against DU must fail as DU did not design, manufacture, or sell the defective chair. The court dismissed Cunningham's negligence claim as well. The court noted that Cunningham was not a party to the contract between

DU and Top Drawer. However, the court held that DU owed "a common-law duty to use ordinary care to avoid physical harm to foreseeable persons in the execution of its undertakings." But there was no evidence that DU breached that duty. "The happening of an accident is not, in and of itself, evidence of negligence." Cunningham was required to "present some facts that either directly or circumstantially establish negligence."

Here, there simply was no evidence that DU disassembled the chairs or damaged them in a way that would lead to their collapse. Although a doctor stated at the time that "they should have removed the whole damn row. If one seat broke, the whole row broke," this statement did not support that DU caused the one seat or whole row to break. Dr. Banooni could not support that the five-seater was in perfect working order before Cunningham's accident. He was not a qualified expert on this topic. While Cunningham accused DU of moving the chairs without special equipment, she provided no evidence that special equipment was needed such that DU would have breached its duty. And Harvey's testimony that he observed "twisting" was "not evidence that a defect existed," that DU should have known of a defect, or that DU caused a defect.

Finally, the court rejected Cunningham's reliance on the doctrine of res ipsa loquitor. The chair was not in DU's exclusive control. No one had documents supporting that this particular five-seater was returned just before the accident rather than during an earlier delivery. "[E]ven if the subject chair was in the last set of items that [DU] worked on, at least four days elapsed where the chairs were not in the exclusive control of [DU]."

The court summarily dismissed Cunningham's claims against Top Drawer on the same day. Cunningham later stipulated to the dismissal of her claims against MHP. Cunningham then filed her claim of appeal regarding the dismissal of her negligence claim against DU alone.

II. DISCUSSION

We review de novo a circuit court's resolution of a summary disposition motion. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher*, 300 Mich App at 139-140.]

The circuit court did not err in dismissing Cunningham's negligence claim against DU. "To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1)

the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011).

DU owed Cunningham a duty to use ordinary care to prevent injury to others. DU oversimplifies the duty owed to a third-party when a party takes on a job under a contract by relying on *Fultz v Union-Commerce Assocs*, 470 Mich 460; 683 NW2d 587 (2004). The Michigan Supreme Court has since clarified in *Loweke*, 489 Mich at 170, that the existence of a contract does not extinguish existing duties of care owed to outside parties. "*Fultz* did not extinguish the simple idea that is embedded deep within the American common law of torts: if one having assumed to act, does so negligently, then liability exists to a third party for failure . . . to exercise care and skill in the performance itself." *Id*. at 170-171 (cleaned up). Under this legal principle, DU owed a duty to those MHP clients who sit on the subject five-seater to use ordinary care in moving and reupholstering the seats to avoid injury.

However, Cunningham failed to present evidence that DU breached its duty or caused the chair collapse. Although Cunningham suggested that DU breached the standard of care in its method of moving the five-seater, Cunningham made no attempt to establish the standard of care or what was required to meet it. There is no evidence that DU was negligent in sending two employees to move the five-seater with the assistance of furniture dollies.

Second, from the accounts of Dimitrie and Dr. Banooni, the five-seater collapsed because two segments of the base cylinder came apart. There was a short, four-inch rod inside the cylinder, but it failed to hold the bench together. Dr. Banooni claimed to observe loose screws either on the floor or hanging from the cylinder. However, those screws were gone by the time Dimitrie came to repair the five-seater. DU did not remove screws holding the cylinder segments together; it removed screws holding the seats onto the metal plates welded to the cylinder. DU did not take apart the cylinder segments or break the rod inside.

Moreover, Harvey's observation that the cylinder segments "twisted" during the move was not evidence that DU broke the seat or should have realized the bench's structure was compromised. It is equally likely that the bench was designed and built with some give. It is mere speculation that the turning of the cylinder was a harbinger of collapse.

And Dr. Banooni's claim that the five-seater was in perfect condition before DU reupholstered the seats is not supported by the evidence. Dr. Banooni admitted that he did not inspect the seat when it was moved into his office, instead taking the word of his new partner about its condition. No one with direct knowledge of the five-seater's condition was deposed. Accordingly, there is no admissible evidence regarding the seat's pre-reupholstery condition.

In the alternative of presenting evidence that DU caused the defect, Cunningham contends that chairs generally do not collapse without some negligence and the doctrine of res ipsa loquitor puts DU on the hook for the negligence in this case. This Court recently outlined the law of res ipsa loquitor in *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 19-20; 930 NW2d 393 (2018), as follows:

> The issue of whether the doctrine of res ipsa loquitur is applicable to a particular case is a question of law. *Jones v Porretta*, 428 Mich 132, 154 n 8; 405 NW2d 863 (1987).
>
> "The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act. . . ." *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005) ([cleaned up]). It is not an independent cause of action. Our Supreme Court has provided the following standard:
>
> > In order to avail themselves of the doctrine of res ipsa loquitur, plaintiffs must meet the following conditions:
> >
> > (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
> >
> > (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
> >
> > (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
> >
> > (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Id*. ([cleaned up]).]
>
> Although plaintiff must establish that the event was of a kind that ordinarily does not occur in the absence of negligence, plaintiff must also produce some evidence of wrongdoing beyond the mere happening of the event. *Fuller v Wurzburg Dry Goods Co*, 192 Mich 447, 448, 158 NW 1026 (1916).

The doctrine of res ipsa loquitor cannot save Cunningham's lawsuit. First, chairs sometimes fail in the absence of negligence. Furniture wears out over time. The five-seater at issue in this case has been used inside busy waiting rooms for an unknown period of years. It is possible that the screws holding the cylinders together loosened over time or that their threads wore out. It is also possible that the support rod inside the cylinder wore out over time.

The five-seater also was not in the exclusive control of DU. The five-seater had been in the control of one medical practice before being moved to a second medical office. Although Cunningham claimed that the five-seater was returned to the medical office after the close of business on a Friday, DU's paper records establish that it was delivered on Thursday, July 14, 2016. The chair did not break until Monday morning. There were four days when the bench was not in DU's control before the accident.

Finally, there is no indication that "evidence of the true explanation of the event" was "more readily accessible" to DU than to other parties. The chair had been in MHP's possession and control for much longer than in DU's. MHP had every opportunity to assess the five-seater to determine the cause of the failure. Cunningham's attorney could have accessed the bench for an

examination at any time. Accordingly, there is no ground to impute liability on DU without any evidence of negligence.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Brock A. Swartzle