

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

MARSHA FAVORS,	:	APPEAL NO. C-081122
	:	TRIAL NO. A-0707899
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
OTIS ELEVATOR COMPANY,	:	
NEW BOSTON FUND, INC.,	:	
NEW BOSTON CENTENNIAL, LLC,	:	
and	:	
NEW BOSTON CITIMARK, LLC,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

On October 25, 2005, plaintiff-appellant Marsha Favors was injured at work when the elevator she was riding “dropped,” after the elevator’s interior lights had flickered, and then came to a stop between floors. Favors remained stuck in the elevator for almost two hours before maintenance personnel arrived. The elevator was located in Three Centennial Plaza, a downtown Cincinnati office building owned and/or managed by defendants-appellees, New Boston Fund, Inc., New Boston

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Citimark, LLC, and New Boston Centennial, LLC (collectively “New Boston”). New Boston had contracted with the manufacturer of the elevator, defendant-appellee Otis Elevator Company (“Otis”), to maintain the elevators in the building.

Because of her injuries, Favors filed a personal-injury action asserting product-liability claims against Otis and negligence claims against New Boston. Both Otis and New Boston moved for summary judgment, which the trial court granted. Favors now appeals, contending, in a single assignment of error, that the trial court erred by entering summary judgment in favor of Otis and New Boston. Because the product-liability claims against Otis were filed outside either of two statutes of repose, and because Favors was unable to provide any evidence demonstrating negligence by New Boston, we affirm the trial court’s judgment.

Standard of Review

Because summary judgment presents only questions of law, an appellate court reviews the entry of summary judgment de novo, without deference to the trial court’s determinations.² Summary judgment is proper pursuant to Civ.R. 56(C) only when (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.³

The party moving for summary judgment “bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the

² See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.

³ See, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

essential element(s) of the nonmoving party's claims.”⁴ Once the moving party discharges that burden, the nonmoving party then has “a reciprocal burden to set forth specific facts by the means listed in Civ.R. 56(E) to show that a triable issue of fact exists.”⁵

Product-Liability Claims

Favors asserted product-liability claims against Otis, alleging the defective design and manufacture of the elevator, as well as the failure to instruct on how to properly use the elevator. In its summary-judgment motion, Otis argued that because the elevator was an “improvement to real property,” the ten-year statute of repose set forth in R.C. 2305.131 applied to this case. We agree that R.C. 2305.131 applies to this case if an elevator is an improvement to real property; and in the alternative, the statute of repose set forth in R.C. 2305.10 applies if the elevator is considered a “product.”

R.C. 2305.131(A)(1) provides that “no cause of action to recover damages for bodily injury * * * that arises out of a defective or unsafe condition of an improvement to real property * * * shall accrue * * * later than ten years from the date of substantial completion of such improvement.” This ten-year period may be extended where the plaintiff is a minor or of unsound mind,⁶ and where the unsafe or defective condition is discovered in the last two years of the ten-year period.⁷

R.C. 2305.10(C)(1) provides that “no action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date it was delivered to its first purchaser.” This statute of repose is also

⁴ Id. at 293.

⁵ *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St.3d 45, 47, 517 N.E.2d 904.

⁶ See R.C. 2305.131(A)(3).

⁷ See R.C. 2305.131(A)(2).

subject to the same exceptions for disability or late discovery applicable to property-improvement cases.⁸

With respect to when the ten-year period began to run in this case, the only evidence before the trial court was the affidavit of Brandon Nixon, the maintenance supervisor for Otis's Cincinnati, Ohio, operations. Nixon stated that the elevator at issue was constructed and installed by Otis in 1987. The owners of the building at that time took "final acceptance" of the elevator on November 23, 1987. On that date, Nixon stated, "the elevator was fit for its intended purpose, worked properly, and there was no design, installation, construction or manufacturing defects [and] [t]he elevator was not defective or unreasonably dangerous."

Given that the evidence demonstrated that the elevator was installed on November 23, 1987, the ten-year period for a cause of action to accrue expired in November 1997, eight years prior to Favors filing her lawsuit. Further, there was no evidence presented that any exceptions to the ten-year period applied. Accordingly, R.C. 2305.131(A)(1) or, in the alternative, R.C. 2305.10(C)(1) barred Favors's product-liability claims against Otis.

Claims of Negligence

Favors claimed that New Boston had negligently maintained the elevators on its property. In its motion for summary judgment, New Boston relied on Nixon's affidavit and Favors's deposition to demonstrate that New Boston had not been negligent in maintaining the elevators.

Nixon's affidavit stated that trained and qualified elevator mechanics for Otis had been regularly servicing the elevators in New Boston's building since February 1,

⁸ See R.C. 2305.10 (C)(4) and (5).

2004. Nixon stated that, between October 2004 and October 2005, the elevator at issue had been regularly examined and maintained, and that none of the examinations had “revealed any problems with the elevator’s emergency stopping devices or equipment or any other problems that would cause the elevator to unexpectedly drop from a floor or stop between floors.” Nixon also stated that Otis had received no reports of any such problems with this elevator in the year prior to Favors’s accident. The latest service for the elevator was completed by Otis on October 11, 2005. At that time, the elevator was working properly.

New Boston presented evidence demonstrating that it had fulfilled its duty to properly maintain the elevators in its building. Favors did not offer any evidence to dispute this. Favors did testify in her deposition that she knew of someone who had been injured while riding an elevator in New Boston’s office building, but Favors could not remember the person’s name or if that person had been injured while riding the same elevator that Favors had been riding.

Next, Favors argues that the doctrine of *res ipsa loquitur* applied in this case. But we conclude that this doctrine was not applicable because there was no evidence demonstrating that, “but for” New Boston’s negligence, the accident would not have happened. Nixon opined in his affidavit that the elevator could have stopped between floors even if ordinary care had been used. He stated that the elevator could have stopped because of “an an intermittent power failure or drain,” which would not have been the result of negligence in the maintenance of the elevator. There was no evidence presented by Favors countering this opinion, to create a dispute of fact.

Accordingly, because the statutes of repose operated to bar Favors’s product-liability claims, and because there was no evidence that New Boston violated its duty

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to maintain the elevators, we overrule Favors's assignment of error. Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on November 4, 2009

per order of the Court _____.
Presiding Judge