88-LW-1531 (10th)

Tom CHRISTIAN, Plaintiff-Appellant,

Carlos A. Marquez et al., Plaintiffs-Appellees,

v.

Ronald F. HARTMAN et al., Defendants-Appellees.

No. 87AP-217.
10th District Court of Appeals of Ohio, Franklin County.
Decided on May 5, 1988.

Appeal from the Ohio Court of Claims.

Chester, Hoffman & Willcox, and Bradley N. Frick; Gottfried, Palmer & Linsker, and Richard D. Palmer, for appellants.

Lane, Alton & Horst, John M. Alton and John A. Fiocca, Jr., for appellee Ronald F. Hartman.

OPINION

BOWMAN, Judge.

In August 1983, appellants [1], Tom Christian and Carlos Marquez, retained appellee, Ronald Hartman, to represent them in the purchase of a carry-out store business known as Woody's Farm Market. Appellee was to prepare an agreement for the purchase of the carry-out business from the seller, Woody Porter, and appellee agreed to represent appellants at the closing. Since appellants had also requested that appellee make an application on their behalf to transfer the liquor license associated with the business, it was necessary for the tax liens on the business to be paid, including any outstanding Ohio sales tax assessments which existed up to and including the date of the closing, October 28, 1983. Accordingly, appellee also agreed to assure that the property in question was free of tax liens and other liens prior to the closing.

After appellants and Porter entered into the purchase agreement, appellee assisted appellants with the completion of the application for transfer of ownership of the liquor license. Because appellee was aware that the Ohio Department of Liquor Control would not issue a license to appellants until all of the liens, including sales tax liens, were paid, appellee had several meetings and/or conversations with Porter's attorney concerning payment of those liens. The tax lien which is at issue in this case is the sales tax lien incurred by Porter prior to and including October 28, 1983.

Prior to the date of closing, appellee and Porter's attorney attempted to ascertain the amount of sales tax due in order to comply with R.C. 5739.14 which imposes potential liability for unpaid sales taxes upon the transferee of a business. Because Porter was liable for all unpaid sales taxes incurred up to and including the date of the closing, Porter's attorney contacted several state agencies regarding the amount of unpaid sales taxes which would be due as of October 28, 1983 who told him the amount of sales tax due and owing by Woody's Farm Market up to and including October 28, 1983 was $4,336.53. Appellee confirmed this amount with various other state agencies. Prior to the closing, Porter's attorney and appellee requested that the representatives of the various state agencies confirm the $4,336.53 figure in writing, but they refused to do so. On the day of the closing, representatives of the Ohio Department of Taxation, Sales Tax Division, verbally informed appellee that the amount due and owing the state of Ohio up to and including that day was in fact $4,336.53.

At the closing, $4,336.53 was withheld from the sales proceeds in order to pay the unpaid sales taxes. Following the closing, Porter's attorney personally carried the check for this amount to the Department of Taxation for payment. Subsequently, the Ohio Department of Liquor Control issued the transfer of the liquor permit to appellants.

In May or June 1984, appellants contacted appellee to inform him that they had received notice that, pursuant to R.C. 5739.14, they were liable to the state of Ohio for the payment of unpaid sales taxes incurred by Porter in the

amount of $19,677.89. Appellee had protected appellants from R.C. 5739.14 in the purchase agreement by providing that Porter, as the seller of the business, would be liable for all unpaid sales taxes which were due the state of Ohio up to and including the date of closing. However, although the seller, Porter, was liable for such unpaid sales taxes, he had filed bankruptcy and was otherwise insolvent.

Appellants filed an action against appellee alleging that he committed legal malpractice by failing to ascertain the correct amount of unpaid sales taxes due and owing the state of Ohio from Porter up to and including the date of the closing. Subsequent to the filing of appellants' complaint, appellee filed a third-party complaint against the state of Ohio for indemnification on the basis that the state, through several of its agencies, negligently failed to provide either appellee or Porter's attorney with accurate information concerning the amount of unpaid sales taxes. Thereafter, this case was removed from the court of common pleas to the Ohio Court of Claims.

Appellee filed a motion for summary judgment and on February 12, 1987, the Court of Claims rendered judgment in his favor finding that there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law. In addition, the court found that appellee had not committed any neglectful act nor any actionable omission in his representation of the appellants. It is from this decision that appellants now bring this appeal and assert the following assignments of error:

"1.Summary judgment was improperly granted as there are genuine issues of facts upon which reasonable minds could differ.

"2.Summary judgment was improperly granted as appellee is not entitled to a judgment as a matter of law.

"3.Upon review of the evidence reasonable minds could come to more than one conclusion, hence the Court of Claims improperly granted appellee's motion for summary judgment.

"4.Appellee is not entitled to a judgment as a matter of law: the doctrine of res ispa loquitur [sic] is applicable to legal malpractice action."

Appellants' first three assignments of error are related and will be considered together.

Summary judgment is proper if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. It is a procedural device designed to terminate litigation at an early stage where a resolution of factual disputes is unnecessary. However, it must be awarded with caution, resolving all doubts and construing the evidence against the moving party and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting summary judgment. Moreover, the party against whom the motion is made is entitled to have the evidence construed most strongly in his favor. See Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc. (1986), 24 Ohio St.3d 198; Norris v. Ohio Std. Oil Co. (1982), 70 Ohio St.2d 1; Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64.

In State v. Sloan (1956), 164 Ohio St. 579, the court held, at the syllabus:

"1.Section 5739.14, Revised Code, imposes a duty upon the purchaser of a business to determine from the Department of Taxation that either the seller owes no accrued sales taxes, or, if such taxes are owed, the amount thereof, and, if the latter, to withhold from the purchase price the amount owed until the seller produces a receipt from the Tax Commissioner showing that the taxes have been paid or a certificate indicating that no taxes are due."

In its opinion, the court held that R.C. 5739.14 imposes the duty and places the burden upon a purchaser of a business to exercise due diligence to determine that sales taxes which have accrued under the operation of the seller are either paid, or that provision has been made for such payment.

In the case at bar, appellants assert that a genuine issue of material fact exists as to whether appellee met the applicable standard of care when representing the buyer of a business with a liquor license. In support of their position that appellee did not exercise due diligence in the sale of the business, appellants attached the affidavit of Barbara Weithe, an attorney who has had numerous experiences representing either the buyer or seller of businesses with liquor

licenses. In her affidavit, Weithe sets forth what, in her expert opinion, is the usual and customary procedure to undertake in the sale of a business with a liquor license. Appellants contend that the court below did not consider the affidavit of Weithe prior to making its decision in this case. This court disagrees. In its decision the Court of Claims stated:

"I do not find that expert evidence is required in this legal malpractice action to establish the attorney's breach of duty of care for the reason that the lack of any breach is so obvious that it can be determined by this court as a matter of law. Bloom v. Dieckman (1983), 11 Ohio App.3d 202."

This does not mean that the court below failed to consider Weithe's affidavit, it simply determined that such evidence was unnecessary. However, this court disagrees with this finding of the trial court.

Weithe's affidavit, in setting forth the usual and customary degree of care which should be exercised in connection with the representation of a buyer or seller of a business with a liquor license, details specific acts which should be undertaken in the process to protect the parties to the sale. Appellee, in his affidavit, sets forth the actions he took in regard to the sale. Because the course of conduct appellee took differs from the standard set forth in Weithe's affidavit, there is an issue of fact as to whether appellee's conduct was negligent. Accordingly, appellants' first three assignments of error are well-taken.

In their fourth assignment of error, appellants assert that the doctrine of res ipsa loquitur is applicable to legal malpractice actions and, therefore, appellee is not entitled to judgment as a matter of law. The doctrine of res ipsa loquitur is founded on an absence of specific proof of acts or omissions constituting negligence. The doctrine rests upon the foundation that the true cause of the occurrence is within the knowledge or access of the defendant, and not within the plaintiff's knowledge or accessible to him. The doctrine of res ipsa loquitur is not a substantive rule of law, but is a rule of evidence which permits, but does not require, the jury to draw an inference of negligence under the conditions presented. By the very definition of the doctrine, it cannot be applied to one who is not in control. See Shannon v. Jaller (1966), 6 Ohio App.2d 206, and Shields v. King (1973), 40 Ohio App.2d 77.

In Shields, the court held, at the syllabus:

"2.Under the doctrine of res ispa loquitur [sic], an inference of negligence is permitted from the mere happening of an accident where the defendant owes the duty and possesses the sole power of preventing the occurrence by the exercise of reasonable care and the means of explaining the cause are available to the defendant, but inaccessible to the plaintiff. The doctrine arises from the inherent nature and character of the act causing the injury, and from the probabilities reasonably to be inferred from the character of the act itself."

In determining the applicability of the doctrine, considerable weight is given to a situation where the facts are peculiarly within the knowledge of the defendant. Shannon, supra.

This court finds that the doctrine of res ipsa loquitur is not applicable in the case at bar. By its definition, it cannot be applied to one who is not in control, and this court finds that appellee did not have exclusive control over the information as to how much sales tax was owing at the time of the closing. Appellee exercised reasonable care and due diligence in determining how much sales tax was owing at the time of the closing. He could reasonably rely on the information that the state gave him in determining the amount of tax due, as the state and its agencies were in the sole possession of the information of how much tax was owing as of and including October 28, 1983. Appellee did not possess the sole power of preventing the occurrence herein since, but for the fact that incorrect information was furnished to him by the state, appellants would have never received an additional tax bill. Accordingly, appellants' fourth assignment of error is not well-taken.

For the foregoing reasons, appellants' first, second and third assignments of error are sustained and the fourth assignment of error is overruled. The judgment of the trial court is reversed and the case is remanded.

Judgment reversed.

REILLY and BRYANT, JJ., concur.

Footnote 1 .The court refers to appellants as Tom Christian and Carlos Marquez, as they jointly filed a brief as appellants, however only Tom Christian filed the notice of appeal.