IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ANNA MARIE TURK, *et al.*	)	**CASE NO: CV 09 684984**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs	)	
	)	
NOVACARE REHABILITATION OF OHIO, INC., *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants	)	

John P. O'Donnell, J.:

Plaintiff Anna Marie Turk was injured on October 31, 2005, at the offices of defendant NovaCare Rehabilitation of Ohio, Inc.[1] Her lawsuit claims that the defendant's negligence caused her injury. NovaCare has now filed a motion for summary judgment. For the reasons that follow, the court grants the defendant's motion for summary judgment.

FACTS

The plaintiff was a physical therapy patient at the defendant's facility on October 31, 2005. She was in the women's locker room when she was "struck by a row of 10 lockers" that fell on her and threw her "against the adjacent wall."[2] There is no additional evidence in this case about how or why the lockers fell.[3] The plaintiff claims in this lawsuit that NovaCare was

[1] Anna Marie Turk's husband Frank Turk is also a plaintiff with his own claim for loss of consortium but for ease of reference this entry will refer to the plaintiff in the singular. NovaCare's landlord, the property owner 731 Beta, Ltd., is also a named defendant. 731 Beta's motion for summary judgment was already granted, so this entry will refer to NovaCare as a defendant in the singular.

[2] See exhibit A to the defendant's 9/17/09 brief in opposition, affidavit of plaintiff, at ¶3-5. Although the plaintiff's credibility is not weighed when considering a motion for summary judgment, it is worth noting that the photographs of the lockers, at exhibit G to the defendant's 6/17/09 motion for summary judgment, show a total of 6 lockers stacked 2 high and 3 wide.

[3] The plaintiff is apparently the only witness to the incident. If she has been deposed, that deposition has not been filed with the court.

negligent for maintaining a "defective and dangerous condition" by not fastening the stacked lockers to a wall.[4]

LAW

In order to establish actionable negligence, the plaintiff must show the existence of a duty, a breach of the duty, and an injury resulting proximately from the breach.[5]

The parties agree that the plaintiff is a business invitee. An occupier of premises ordinarily owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers.[6] The duty includes taking reasonable precautions to protect an invitee from dangers which are foreseeable from the arrangement or use of the premises.[7] An occupier of a premises is not, however, the insurer of a business invitee's safety, and the plaintiff must prove that the defendant had either actual or constructive notice of the alleged hazard which caused the injury.[8]

Notice may exist if: the defendant was responsible for a hazard; or had actual knowledge of a hazard; or the hazard had existed for a sufficient length of time to justify an inference that the failure to eliminate it was attributable to a lack of ordinary care.[9]

Before examining the evidence to determine whether there is a genuine issue of material fact about whether the defendant had notice of a hazard, the evidence must show that the condition complained of by the plaintiff was, in fact, a hazard. That inquiry necessitates consideration of how the incident happened, a consideration made impossible here by the dearth of evidence. The only thing known about the incident is that the plaintiff "was struck by a row

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[4] See, generally, complaint at ¶25-31.
[5] *Sabolik v. HGG Chestnut Lake Ltd. Partnership*, 180 Ohio App.3d 576, 2009-Ohio-130, at ¶10.
[6] *Fernandez v. Outback Steakhouse*, 2009-Ohio-5384, Cuyahoga App. No. 92912, at ¶12.
[7] *Id.*
[8] *Johnson v. MetroHealth Med. Ctr.*, 2007-Ohio-392, Cuyahoga App. No. 87976, at ¶13.
[9] See, e.g., *Id.*

of 10 lockers in the women's locker room."[10] No more information is provided. The plaintiff does not say whether any of the lockers were open. She does not say whether the lockers were evenly stacked on each other. She does not say whether any of the lockers had heavy things in them. She does not say whether they were tilted or askew. She does not say whether the lockers appeared to be in their usual position or seemed to be in a temporary location. Above all, she does not say whether she touched the lockers before they fell.

In short, the plaintiff's only evidence that these lockers were a hazard is the fact that this incident occurred. An inference of negligence can never arise from mere guess, speculation, or wishful thinking; a plaintiff must be able to show what happened to cause the injury in order to prove negligence.[11] It is incumbent on the plaintiff to show how and why an injury occurred – to develop facts from which it can be determined by the jury that the defendant failed to exercise due care and that such failure was the proximate cause of the injury.[12]

This court is not persuaded that the plaintiff has produced sufficient evidence that a hazard even existed to create a genuine issue of material fact. Standing alone, that conclusion is sufficient to justify granting summary judgment in favor of the defendant. However, assuming that the lockers did constitute a hazard, summary judgment is warranted for the additional reason that there is no evidence here to show that the defendant had knowledge of the hazard.

First, there is no evidence that the defendant created a hazard. While it is true that the lockers were installed either by the defendant or at its request,[13] there is no evidence to allow a finder of fact to conclude that in doing so the defendant created a hazard. The lockers and a hazard are not synonymous. The locker manufacturer did not sell the lockers with fasteners or

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[10] Plaintiff's affidavit, ¶4.
[11] *Cipollone v. Hoffmeir*, 2007-Ohio-3788, 1st Dist. App. No. C-060482, at ¶26.
[12] *Boles v. Montgomery Ward and Co.* (1950), 153 Ohio St. 381, 389.
[13] A full understanding of exactly when the lockers were installed and by whom is made difficult by the inclusion in the record of only a portion of the deposition testimony of Deborah Singer from NovaCare.

other devices, nor did the manufacturer provide instructions that the lockers had to be somehow affixed to the wall.[14]

The evidence in this case cannot justify a conclusion that by installing the lockers, without more, the defendant knew it was creating a hazard. Tort liability exists, in part, to provide an incentive for people and businesses to conduct their affairs in a way that will not injure others. Requiring notice of an alleged hazard in a premises liability context is vital to further that policy. A person responsible for the safety of a premises cannot modify his conduct to eliminate hazards unless he is aware that hazards exist. In a premises liability lawsuit a fact finder should be able to pinpoint a decision by a defendant to act, or fail to act, that the defendant should have foreseen would cause injury. The plaintiff asserts that the faulty conduct here is failing "to secure the lockers"[15] but the evidence offers no reason why the defendant should have known that not securing lockers that didn't come with fasteners would lead to injury.

For the same reason, and because of the absence from the record of any evidence of a prior similar occurrence, the plaintiff has not created an issue of fact about whether a hazard had existed for a sufficient time to justify an inference that the defendant was negligent.

Finally, there is no evidence that the defendant knew the lockers, as installed, in fact represented a hazardous condition. The lockers had apparently been in use for some period of time before October 31, 2005. The plaintiff has provided no evidence that they had ever fallen, tipped, or even wobbled before the date of her injury.[16]

Because there is no evidence sufficient to create a genuine issue of material fact about whether the defendant had notice of a hazardous condition on its premises, summary judgment is warranted.

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[14] See exhibit G to the defendant's motion for summary judgment.
[15] Complaint, ¶29.
[16] Not to mention at the time of injury since, as already noted, the plaintiff has not said what happened.

The plaintiff, in opposition to the motion for summary judgment, argues that the evidence here justifies application of the doctrine of *res ipsa loquitur*. She is not correct. The rule of *res ipsa loquitur* is a rule of evidence which permits the jury to draw an inference of negligence where the instrumentality causing the injury is under the exclusive management and control of the defendant and an accident occurs under such circumstances that in the ordinary course of events would not occur when ordinary care is observed.[17] The doctrine does not apply where an unexplained accident might have been caused by the plaintiff's negligence or been due to one of several causes, for some of which the defendant is not responsible.[18]

Concerning the doctrine of *res ipsa loquitur*, the Ohio Supreme Court has said:

> The particular justice of the doctrine rests upon the foundation that the true cause of the occurrence, whether innocent or culpable, is within the knowledge or access of the defendant and not within the knowledge or access of the plaintiff.[19]

Under the facts here, the doctrine does not apply for two reasons. First, the instrumentality, *i.e.*, the lockers, were not under the exclusive control of the defendant. While the defendant was certainly in control of the entire premises by virtue of being the tenant, a locker room, by its nature, is a place used by many people. Any one of those people, patients or otherwise, at any time, may have done something to make an otherwise safe locker room hazardous.

The lockers here are analogous to the bathroom door in *Warner v. Interstate Theaters, Inc.* (1952) 73 Ohio Law Abs. 249. In *Warner*, the plaintiff was injured when a swinging bathroom door fell on her. The Court of Appeals noted that "the operation of such doors is not within the exclusive control of the owner of the building or proprietor of the store. Customers and patrons take a very distinct part in their operation and are chargeable with the exercise of

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[17] *Fink v. The New York Central Railroad Co.* (1944), 144 Ohio St. 1, 9.
[18] *Warner v. Interstate Theaters, Inc.* (1952), 73 Ohio Law Abs. 249.
[19] *Fink, supra*, at 5.

ordinary care in their use. Injury may occur in their operation from a lack of such care on the part of the persons who use them, and for whose negligence the owner or proprietor would be in no wise responsible." Another comparison may be drawn to a spill of slippery material on a grocery floor. By the plaintiff's reasoning, a grocer may be answerable for negligence under the doctrine of *res ipsa loquitur* by virtue of being in control of the store, despite the fact that shoppers handling the merchandise are in an out of the store all day. That is not the law in Ohio.

A second reason precluding application of *res ipsa loquitur* to the known facts here is the equal possibility that the plaintiff herself was negligent.

For all of these reasons, the court finds the defendant's motion for summary judgment to be well-taken. Therefore, that motion is granted and summary judgment in favor of the defendant NovaCare is hereby entered on the plaintiffs'[20] complaint.

IT IS SO ORDERED:

Date: _____ _____
Judge John P. O'Donnell

[20] Including the loss of consortium claim of plaintiff Frank Turk.

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of January, 2010, to the following:

Christopher M. Devito, Esq.
Morganstern, MacAdams & DeVito Co., L.P.A.
623 West Saint Clair Avenue
Cleveland, OH 44113-1204
Attorney for Plaintiffs

Kenneth P. Abbarno, Esq.
Reminger Co., LPA
1400 Midland Building
101 Prospect Avenue, West
Cleveland, OH 44115-1093
Attorney for Defendants

_____
Judge John P. O'Donnell