STATE OF MICHIGAN

COURT OF APPEALS

Estate of NANCY VAN ANTWERP, by GEORGE VAN ANTWERP, Personal Representative, Plaintiff-Appellant,	UNPUBLISHED August 18, 2011
v GROSSE POINTE VILLAGE GRILL, INC., Defendant-Appellee.	No. 296920 Wayne Circuit Court LC No. 09-012338-NO

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant, Grosse Pointe Village Grill, Inc. We affirm.

I

The decedent, 77-year-old Nancy Van Antwerp, and her husband, plaintiff George Van Antwerp, stopped at Grosse Pointe Village Grill for something to eat. They were in the restaurant between 20 and 45 minutes. In preparing to exit the restaurant through the back entrance, they walked down a hallway past the restrooms and toward the back door. A black carpet runner approximately 3 feet wide and 10 feet long was on the tan tiled floor leading to the back door. George walked in front of Nancy to hold the door for her. While his back was turned away, Nancy fell. Neither George nor anyone else witnessed the fall. Nancy died two weeks later due to an intracranial bleed caused by a fall.

Plaintiff filed the present premises liability suit against defendant alleging that the carpet runner unexpectedly slid as Nancy stepped on it, causing her to lose her balance and fall. Plaintiff asserted that Nancy's injuries sustained in the fall were caused by defendant's failure to properly secure the runner to the tile floor and the breach of the failure to warn Nancy of the hidden danger of slipping caused by the unsecured runner.

Defendant moved for summary disposition. It alleged that plaintiff failed to create an issue of fact with regard to whether the mat was in a dangerous condition at the time of the fall and to whether defendant knew, or in the exercise of reasonable care, ought to have known and remedied it. Defendant noted that a videotape of the fall revealed that Nancy shuffled her feet as

she walked down the hall and her foot caught the edge of the carpet runner and pulled it up, causing her to lose her balance and fall. Following a hearing on the motion, the trial court found that plaintiff failed to present any evidence that either the condition of the mat or the floor directly underneath the mat caused or contributed to Nancy's fall, or that defendant had any notice that something was wrong with the mat or with the floor underneath the mat. The court further noted that "it really does appear from looking at the still photographs and looking at the video, that what happened is that Mrs. Van Antwerp, either because of age or frailty or some other case, tripped on the mat and fell and tragically she ultimately died."

II

Plaintiff first contends that defendant's failure to produce the carpet runner entitled him to an adverse inference under M Civ JI 6.01 permitting the jury to construe the fact that defendant could not produce the carpet runner against it. Accordingly, he argues that this raises a genuine issue of material fact, sufficient to avoid summary disposition.

M Civ JI 6.01 sets forth the contours of the adverse inference that a jury may draw from a party's failure to produce evidence. The instruction entitles the jury to draw an adverse inference only when "(1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party." *Ward v Consolidated Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005). Even assuming that the principles contained in the jury instruction apply in the context of a motion for summary disposition, plaintiff has not established that defendant exclusively controlled the carpet runner. The carpet runner in this case was owned and controlled by Superior Linen, which had information about the carpet runners and the tag numbers of the runners supplied to defendant. Both parties had equal access to any information controlled by Superior Linen. Plaintiff had the opportunity during discovery to subpoena Superior Linen for information, including the tag number and current location of the floor mat, but plaintiff failed to do so.

III

Plaintiff next contends that the trial court erred in granting summary disposition in favor of defendant because there was sufficient evidence to show that defendant breached its duty to inspect the premises and make any necessary repairs. We disagree.

An appellate court reviews de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) if no genuine issue of any material fact exists, 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). 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 could differ. *Id.*

"In a premises liability action, the plaintiff must prove (1) the defendant owed the plaintiff a duty, (2) the defendant breached the duty, (3) the breach caused plaintiff's injury, and (4) the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App

710, 712; 737 NW2d 179 (2007). Premises owners have a duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, premises owners are not absolute insurers of the safety of an invitee. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). A premises owner is not required to protect from open and obvious dangers. *Id*. at 612-613. To show a breach of this duty, the plaintiff must show that the injury resulted from a dangerous condition that was caused either by defendant's active negligence or a dangerous condition that defendant knew of or had existed for a sufficient length of time that the defendant should have known about it. *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 603-604; 601 NW2d 172 (1999). For causation, the mere possibility that defendant's negligence may have been the cause of a plaintiff's injuries is not enough to show a causal link. *Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976).

Plaintiff has failed to establish evidence to support a claim of negligence. The affidavit provided by plaintiff's expert offered no factual evidence beyond a hypothetical situation to show an unreasonable risk of harm at the Village Grill. While plaintiff did provide evidence that defendant did not have formal, written procedures for cleaning the floors and mop heads, this evidence alone is not enough to show that defendant was negligent. Furthermore, plaintiff has failed to show more than a mere possibility that the condition of the floor mat was the cause of the deceased's fall. Because plaintiff has failed to establish any evidence to support a claim of negligence, the trial court properly granted summary disposition in favor of defendant.

IV

Because we affirm the trial court's finding that plaintiff failed to establish evidence to support a claim of negligence, we need not address defendant's open and obvious argument.

Affirmed. Defendant may tax costs.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering