STATE OF MICHIGAN

COURT OF APPEALS

DORIZELLA FEDRICK,

Plaintiff-Appellant,

v

KMART CORPORATION and U.S. MAINTENANCE,

Defendants-Appellees.

UNPUBLISHED
February 14, 2013

No. 307816
Macomb Circuit Court
LC No. 2010-004568-NO

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Plaintiff brought this premises liability and negligence action against Kmart Corporation ("Kmart") and its maintenance company, U.S. Maintenance, after she slipped and fell on the floor in a Kmart store. The trial court granted defendants' separate motions for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula*, 212 Mich App at 48.

The parties agreed that plaintiff was an invitee on Kmart's premises at the time of her fall. In *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012), our Supreme Court explained:

> The starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his land. With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land. Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware

> and fails to fix the defect, guard against the defect, or warn the invitee of the defect. [Footnotes omitted.]

Kmart sought summary disposition on the ground that plaintiff could not prove that it knew or should have known of any dangerous condition (the slippery floor) before plaintiff fell.

Plaintiff inappropriately relies on the deposition testimony of a Kmart employee, Gabriel Robertson, to argue that Kmart had actual notice of the dangerous condition. Robertson testified that on the day after plaintiff fell, he learned during a conversation with a U.S. Maintenance worker that U.S. Maintenance may have used a different cleaning product in the aisle where plaintiff fell. Because that conversation took place the day *after* plaintiff's fall, it is insufficient to establish that Kmart had notice of any hazardous condition caused by U.S. Maintenance's cleaning products before plaintiff fell. Robertson's testimony also does not support a finding that Kmart knew or should have known that there was a problem in the aisle because the aisle housed automotive products. Robertson admitted that spills occurred more frequently in that aisle than in other aisles because the aisle housed various sprays, waxes, and other liquid products for automobiles. However, there was no evidence that Kmart was aware of any spill or other actual problem with the floor on the day plaintiff fell. Moreover, plaintiff admitted that she did not know what caused her fall.

Plaintiff's theories regarding the cause of her fall were based on speculation and conjecture. In *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001), this Court explained the difference between a reasonable inference and conjecture:

> The observations of our Supreme Court in *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994), quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956), regarding the basic legal distinction between a reasonable inference and impermissible conjecture, albeit made in the context of determining the requisite causal proof in negligence cases, are nonetheless relevant to the present case:
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> "[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. *There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only.* On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." [Emphasis added.]
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> The crucial factor is that "'if [the] evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established.'" *Skinner*, *supra* at 166-167, quoting 57A Am Jur 2d, Negligence, § 461, p 442. In other words, "'*[w]e cannot permit the jury to guess.*'" *Skinner*, *supra* at 166, quoting *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957) (emphasis added).

Plaintiff presented different plausible explanations for why the floor may have been slippery, i.e., the use of a new cleaning product by U.S. Maintenance, or a spill from an automotive product, but she did not present any evidence selectively supporting either of those possible explanations. Plaintiff admitted that she did not notice any substance on the floor before or after she fell, and she did know what caused her fall. Further, plaintiff did not present evidence of any chemicals that U.S. Maintenance may have used on the floor, and there was no evidence that the condition of the floor was made worse by anything U.S. Maintenance did or used when it cleaned the floor the night before plaintiff fell.

Plaintiff argues that the trial court failed to consider that Robertson and another Kmart employee, Leah Crank, had testified at their depositions that the floor where plaintiff fell was known to be slick. Robertson only explained that the aisle was more susceptible to spills because of the products that were housed there. He did not testify that he was aware of any product spill before plaintiff fell. Robertson's testimony does not support an inference that he knew or should have known of a hazardous condition in the aisle at the time of plaintiff's fall. Although Crank acknowledged that the floor where plaintiff fell appeared "slick," she also stated that it appeared to be a "normal wax floor." Further, she was not aware of any problem with the floor before plaintiff fell. Accordingly, neither Robertson's nor Crank's testimony support a finding that Kmart knew or should have known about a hazardous condition on the floor before plaintiff fell.

The trial court did not err in finding that there was no genuine issue of material fact with regard to whether Kmart knew or should have known of any dangerous condition before plaintiff fell. Thus, the court did not err in granting summary disposition in favor of Kmart.

Plaintiff also challenges the trial court's decision granting summary disposition in favor of U.S. Maintenance on her negligence claim. On appeal, plaintiff argues that U.S. Maintenance had a duty to keep the floor clean from hazardous substances and was aware of, or should have known about, the substance that caused plaintiff's fall and failed to remove it. In support of her argument, plaintiff relies on her deposition testimony in which she stated that, after her fall, she heard an unidentified Kmart employee state that "somebody should have cleaned that up."

Initially, we note that plaintiff did not present this deposition testimony in the trial court. "When reviewing a decision on a motion for summary disposition, this Court will not consider evidence that had not been submitted to the lower court at the time the motion was decided." *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009). This Court's review is limited to the record established in the trial court and a party may not expand the record on appeal. *Id*. Regardless, the testimony does not provide support for plaintiff's negligence claim against U.S. Maintenance. First, there is no suggestion that the unidentified Kmart employee's reference to "somebody" was made in reference to U.S. Maintenance. Second, as previously indicated, there is no evidence of what actually caused plaintiff's fall or how long any allegedly dangerous condition existed. Plaintiff's reliance on an unidentified Kmart employee's statement that "somebody" should have cleaned up an unspecified substance is insufficient to show that U.S. Maintenance knew or should have known of a condition on the floor for which it was responsible for removing, particularly when it was not even known what actually caused plaintiff's fall in the first instance. Third, any claim that U.S. Maintenance may have affirmatively caused a hazardous condition is based on speculation and conjecture, rather than reasonable inferences,

which is insufficient to establish a prima facie claim for negligence. Therefore, the trial court did not err in dismissing plaintiff's negligence claim against U.S. Maintenance.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad