STATE OF MICHIGAN

COURT OF APPEALS

ERIKA TELLEZ-GONZALEZ, Plaintiff-Appellant,	UNPUBLISHED June 19, 2018
v	No. 339551 Kent Circuit Court
WAL-MART STORES, INC., Defendant-Appellee.	LC No. 16-06952-NO

Before: MURRAY, C.J., and HOEKSTRA and GADOLA, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the order of the trial court granting summary disposition to defendant under MCR 2.116(C)(10). We affirm.

I. FACTS

This action arises from plaintiff's fall in defendant's Grand Rapids area Wal-Mart store on July 31, 2013. Plaintiff alleges that she tripped on a "clear and/or translucent polyester strapping band" that was on the floor near a cash register in the store, and fell. In her deposition, plaintiff testified that on that day she entered the store with her son and daughter. Her son, then approximately age 8, ran ahead of her, and she walked after him because she was concerned that he was running ahead. As she walked between two cash register stations looking straight ahead, she claimed that her feet became tangled on the plastic strip and she fell. When she stood up, she saw the plastic strip. She testified that she did not see the plastic strip before she fell, and was not sure whether she would have seen the plastic strip had she looked down.

Plaintiff brought this action alleging premises liability and asserting that as a result of the fall, she suffered spinal injuries that will require surgery. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that (1) the plastic band was open and obvious and defendant therefore owed no duty of care to plaintiff with respect to the plastic band, and that (2) plaintiff could not demonstrate that defendant had notice of the condition or an opportunity to repair the condition, and therefore plaintiff could not demonstrate defendant's liability. The trial court granted defendant's motion for summary disposition, finding that there was no question of material fact that the plastic strip was an open and obvious condition. The trial court did not address defendant's argument that defendant did not have notice of the condition. Plaintiff now appeals to this Court.

II. ANALYSIS

Plaintiff challenges the trial court's grant of summary disposition to defendant, arguing that a question of fact exists as to whether the plastic strip on the store's floor was an open and obvious hazard. We disagree.

This Court reviews de novo a trial court's grant or denial of summary disposition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich App 1, 5-6; 890 NW2d 344 (2016). This Court also reviews de novo the application of a legal doctrine, such as the open and obvious doctrine. *Ghaffari v Turner Constr Co*, 473 Mich 16, 19; 699 NW2d 687 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, S*hinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768; 887 NW2d 635 (2016), and should be granted if "there is no genuine issue regarding any material fact 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 party moving for summary disposition under MCR 2.116(C)(10) has the initial burden to support its motion by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Thereafter, the party opposing the motion must go beyond the pleadings and set forth specific facts demonstrating the existence of a genuine issue of material fact. *Oliver v Smith*, 269 Mich App 560, 564; 715 NW2d 314 (2006). The trial court must then consider all the admissible evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). If, giving the benefit of reasonable doubt to the nonmoving party, the record leaves open an issue upon which reasonable minds could differ, a genuine issue of material fact exists. *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423; 864 NW2d 609 (2014).

In a premises liability action, as in any negligence action, the plaintiff must prove the elements of negligence, being that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The element of duty in a negligence action ordinarily is a question of law for the court to decide. *Moning v Alfono*, 400 Mich 425, 436-437; 254 NW2d 759 (1977). By contrast, once it has been established that a duty existed, whether a defendant breached its duty is generally a question of fact. *Boumelhem v Bic Corp*, 211 Mich App 175, 181; 535 NW2d 574 (1995), citing *Moning*, 400 Mich at 438.

Michigan law, however, "distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land," *Lymon v Freedland*, 314 Mich App 746, 756; 887 NW2d 456 (2016) (citation omitted); when a claim involves premises liability, the "liability arises merely from the defendant's duty as an owner, possessor, or occupier of land." *Id*. In a case involving premises liability, the starting point of the analysis is establishing the duty owed by the premises possessor to a person entering the premises. *Hoffner v Lanctoe*, 492 Mich 450,

460; 821 NW2d 88 (2012). With regard to an invitee,[1] a possessor of land owes a duty to use reasonable care to protect the invitee from an unreasonable risk of harm posed by a dangerous condition on the premises. *Id*. The possessor of the premises breaches that duty of ordinary care when he or she knows or should know of a dangerous condition on the premises of which the invitee is unaware, and fails to fix, guard against, or warn the invitee of the defect. *Id.*

Integral to this duty, however, is the consideration whether a danger is "open and obvious." *Id*. The possessor of land is not an absolute insurer of the safety of an invitee. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712-713; 737 NW2d 179 (2007), citing *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). The "overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary [conditions] 'foolproof.' " *Hoffner*, 492 Mich at 460 (citation omitted). The premises possessor therefore does not owe a duty to protect from or warn of dangers that are open and obvious because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id*. at 460-461.

Whether a danger is open and obvious depends upon whether an average person with ordinary intelligence reasonably could be expected to discover it upon casual inspection. *Id*. at 461. This is an objective test and in making this determination, the court must consider "the objective nature of the condition of the premises at issue." *Id*. at 461, quoting *Lugo*, 464 Mich at 524. Because the test is objective, this Court does not consider whether a particular plaintiff should have realized that the condition was dangerous, but rather whether a reasonable person in that position would have foreseen the danger. *Kennedy*, 274 Mich App at 713.

A limited exception to this duty exists when a "special aspect" of the open and obvious condition makes the risk unreasonable and obligates the premises possessor to take reasonable steps to protect the invitee from an unreasonable risk of harm. *Hoffner*, 492 Mich at 461, citing *Lugo*, 464 Mich at 517. The "special aspect" exception to the open and obvious doctrine is a narrow one, and liability under this narrow exception may be imposed only when an open and obvious condition is unreasonably dangerous because it "present[s] an extremely high risk of severe harm to an invitee" under circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented." *Id*. at 462, quoting *Lugo*, 464 Mich at 519 n 2. A condition that is common or avoidable is not considered uniquely dangerous. *Id*. at 463. Here, plaintiff does not contend that the "special aspect" exception applies and the record would not support that argument in any event.

In this case, the trial court granted summary disposition to defendant under MCR 2.116(C)(10). The trial court found that the plastic strip upon which plaintiff allegedly tripped was open and obvious, stating:

[1] The parties do not dispute that plaintiff was an invitee. A possessor of land owes the greatest duty of care to an invitee. *Hoffner*, 492 Mich at 460 n 8.

> An average person would have discovered the strap with a casual inspection. The strap is an open and obvious hazard. Further, the plastic strap does not have any special aspect that makes it an unavoidable hazard or uniquely dangerous. Summary disposition is appropriate for this claim.

The record supports this conclusion. Applying the objective standard, which calls for an examination of the "objective nature of the conditions of the premises at issue," and viewing the evidence in the light most favorable to plaintiff, the plastic strip was open and obvious. Although plaintiff testified that she did not see the plastic strip until after she fell, the question is not whether she saw it but whether an average person with ordinary intelligence reasonably could be expected to have discovered it upon casual inspection. Plaintiff acknowledged that she was looking forward, not down, as she walked and that she was following her young son who had run ahead of her. She testified that after she fell and stood up again, she was able to see the plastic strip on the floor. Photographs included in the trial court record demonstrate that the plastic strip is not invisible and not impossible to see while on the floor of the store, suggesting that the average person would have seen the plastic strip if looking at the plastic strip on the floor in the area in question.

Plaintiff argues that there was a question of fact about the open and obvious nature of the plastic strip because the store's video recording shows dozens of customers and several employees walking in the area in question before she fell without noticing the plastic strip. But the assertion that the people shown on the video do not notice the plastic strip is speculative. The video recording begins one hour before plaintiff's fall. During that hour, several customers walk through the aisle, as do several employees. None of them appear to be concerned about anything on the floor; this could mean that nothing was on the floor, that something was on the floor but was not apparent, or that something was on the floor and was apparent but was not of a concerning nature. At 6:55, however, a customer walks through the area and stands at the checkout station. He looks down, and then uses his foot to move something on the floor from the area next to the checkout station out into the center of the aisle. At that point, the plastic strip is visible in the video. At 7:00, plaintiff walks across that spot, then falls a few feet farther on. The video does not show what caused plaintiff to fall, but her fall does occur shortly after walking across the spot to which the customer at 6:55 moved the object. After plaintiff walks through that area and falls, the plastic strip is no longer apparent on the video, suggesting that plaintiff either stepped on the plastic strip or simply slipped and fell and moved the plastic strip when falling.

Viewing this evidence is the light most favorable to plaintiff, the most that can be said the video establishes is that plaintiff did in fact fall in defendant's store on the date and at the time alleged, and that it is possible that she tripped on the plastic strip as she alleges. The video also suggests that the plastic strip was moved out into the walkway at 6:55 and therefore was only in the walkway for about five minutes before plaintiff fell. Therefore, the video recording that shows people walking in the aisle during the hour before plaintiff's fall does not demonstrate that the plastic strip was not open and obvious as she suggests. Rather, the video suggests that the plastic strip was not in the walkway until shortly before she fell. The video also suggests that the plastic strip was visible, given that the customer who moved the plastic strip at 6:55 saw it, given that it is visible thereafter on the video, and given that the employee helping plaintiff after her fall immediately picked it up.

This Court's analysis in *Kennedy*, 274 Mich App 710, is instructive. In that case, the plaintiff slipped and fell on crushed green grapes on the supermarket floor. Although the crushed grapes and grape residue were similar in color to the beige color of the floor, the plaintiff and other witnesses testified that the grapes were readily observable once they actually looked at the floor. The trial court granted the defendant summary disposition, concluding that the hazard of the crushed grapes was open and obvious based upon the testimony. *Id*. at 714. As in *Kennedy*, plaintiff in this case testified that she did not see the plastic strip on the floor before she tripped and fell, but that she had not been looking at the area of the floor where she was walking at the time that she tripped. After she fell and stood up again, she looked at the floor and was able to see the plastic strip. She testified that she did not know whether she would have been able to see the plastic strip before the fall if she had looked at the floor.

Applying the analysis of this Court in *Kennedy*, we conclude that the potential hazard presented by the plastic strip could have been observed by an average person of ordinary intelligence upon casual inspection. Because the condition was open and obvious, the trial court correctly held that defendant had no duty to warn of or protect plaintiff from the potential hazard of the plastic strip on the floor. Because we conclude that the plastic strip was an open and obvious condition, we decline to reach plaintiff's contention that defendant had notice of the hazard and therefore a duty to warn, which is relevant only if the plastic strip had not been open and obvious.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Michael F. Gadola