STATE OF MICHIGAN

COURT OF APPEALS

LOIS GRAYBILL,

Plaintiff-Appellant,

and

PAUL GRAYBILL,

Plaintiff,

v

VERNA'S TAVERN,

Defendant-Appellee.

UNPUBLISHED
July 30, 2020

No. 350154
Monroe Circuit Court
LC No. 18-141435-NO

Before: FORT HOOD, P.J., and JANSEN and TUKEL, JJ.

PER CURIAM.

In this premises liability action, plaintiff[1] appeals as of right the order of the trial court granting summary disposition in favor of defendant. Plaintiff contends that the trial court erred when it concluded that defendant did not cause or have notice of a defective condition on its premises that caused plaintiff to slip and fall. We disagree and affirm.

Plaintiff was an invitee on defendant's premises on the evening of April 5, 2018. At some point in the evening, plaintiff went outside to defendant's patio so that plaintiff could smoke a cigarette. When plaintiff began to go back inside, lights that had been illuminating the patio went out. Plaintiff testified she had no idea what caused the lights to go out, and that she was not sure whether any of defendant's employees were aware of the same. In any event, as plaintiff continued on in the darkness, plaintiff slipped on an unilluminated stair and injured herself. Plaintiff

[1] Plaintiff-appellant's husband, Paul Graybill, also appeared as a plaintiff in this case. Because Paul was not involved in the underlying incident and does not appear as an appellant, "plaintiff" throughout refers to Lois only.

subsequently brought suit against defendant for failing to reasonably maintain its premises. The trial court granted summary disposition in defendant's favor, noting that there was no evidence that defendant caused or was aware of the lighting condition that caused plaintiff to fall.

Plaintiff contends that the trial court erred when it determined that defendant did not have actual or constructive notice of the dangerous condition on the patio because defendant necessarily created that very condition. Plaintiff also takes issue with the trial court's notation that plaintiff failed to actually plead that defendant caused the condition in plaintiff's complaint. Both arguments are without merit.

We review a decision to grant or deny summary disposition de novo. *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 671; 939 NW2d 738 (2019). "[W]e consider all documentary evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* Summary disposition "is warranted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* "[R]eview is limited to the evidence that has been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009), citing *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Plaintiff's complaint alleged negligence against defendant. "To establish a prima facie case of negligence, plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Finazzo v Fire Equipment Co*, 323 Mich App 620, 635; 918 NW2d 200 (2018). "Importantly, there is a distinction between claims arising from ordinary negligence and claims premised on a condition of the land." *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 13; 930 NW2d 393 (2018) (quotation marks and citation omitted). Claims arising out of the condition of a premises sound exclusively in premises liability; not ordinary negligence. *Id.*, citing *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691; 822 NW2d 254 (2012), and *Kachudas v Invaders Self Auto Wash*, 486 Mich 913, 914 (2010).

> "Historically, Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee. Michigan has not abandoned these common-law classifications. Each of these categories corresponds to a different standard of care that is owed to those injured on the owner's premises. Thus, a landowner's duty to a visitor depends on that visitor's status." [*James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001), quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).]

There is no dispute in this case that plaintiff was an invitee on defendant's premises.

> "An 'invitee' is 'a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception.' The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the

> circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law." [*James*, 464 Mich at 19-20, quoting *Stitt*, 462 Mich at 597.]

"A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he . . . knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 93; 485 NW2d 676 (1992) (quotation marks and citation omitted). Premises owners have a duty to protect invitees against unreasonable risks of harm "in spite of the obviousness or of the plaintiff's knowledge of the danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 624; 537 NW2d 185 (1995).

In this case, the trial court focused on the timing of the scenario and noted that, given that plaintiff's injury occurred almost simultaneously with the lights on the patio going out, there was no evidence that defendant knew or had reason to know of the defective condition. We discern no error from this conclusion. Plaintiff herself testified that she did not know what caused the lights to go out, and while there was some testimony that a light switch was located inside the premises behind the bar, there was no testimony to suggest that the lights were knowingly switched off. Plaintiff provided evidence from affiants who suggested that they overheard frequent complaints to defendant about the lighting conditions on the patio, but plaintiff explicitly testified that she was aware and could see the step that caused her to fall until the lights went out while she was walking. With all of that in mind, the trial court did not err in concluding that there was no evidence to create a genuine issue of material fact as to whether defendant either knew of or caused the specific lighting condition that resulted in plaintiff's fall.

As an aside, we note plaintiff's contention that the trial court erred when it noted that plaintiff failed to plead any causation or awareness on defendant's part. Although this observation was not a basis for the trial court's ruling, we again see no error in the trial court having pointed it out. And, notably, the court was not wrong. There are no specific allegations in plaintiff's complaint as to how defendant caused the lighting to go out, or as to why defendant should have immediately been aware of the lighting when it did go out.

Plaintiff relies on *Ahola v Genesee Christian School*, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2009 (Docket No. 283576),[2] for the contention that defendant's alleged actions—or inactions—in this case were sufficient to create genuine issues of material fact. In that case, the plaintiff slipped on two steps of defendant's school building that he could not see in the darkness. *Ahola*, unpub op at 1. The plaintiff noted that there was very little light coming from inside the building, and that it was "pitch-black" outside the building. *Id.* "Other evidence submitted by [the] plaintiff supported a reasonable inference that the outdoor lights intended to illuminate the area of the steps either had malfunctioned that evening or that the school's maintenance staff had not turned them on." *Id.* We noted:

> Here, the evidence establishes that plaintiff exited into a completely dark area in which the steps were not visible on casual inspection. Defendant should

[2] Unpublished opinions are not binding on this Court pursuant to MCR 7.215(C)(1).

> have reasonably anticipated that darkness over the steps in the school's unlit exit route amounted to an unreasonably dangerous condition that could result in injury. The fact that plaintiff had negotiated these steps three house earlier, in daylight, neither eliminates the danger posed by unlit steps at night nor negates the landowner's duty. Surely, the primary purpose for lighting an exit area is to provide invitees with a safe route of ingress and egress when natural light is unavailable. The risk of harm posed by the absence of light here qualifies as unreasonable despite its obvious nature, given the simple remedial measure that could have prevented injury—turning on or repairing the lights. Consequently, we conclude that whether defendant unreasonably maintained its premises on the evening of the basketball game represents an issue for the jury. [*Id*. at 5.]

Unlike in *Ahola*, this case involves a temporal element that suggests that defendant was unlikely to know of the lighting condition on the patio. Plaintiff fails to address the differences in her brief on appeal, and notes that the value of *Ahola* is simply that the plaintiff in that case was injured in a "completely dark area." However, that *Ahola* involved a plaintiff injured in a dark area is not sufficient to make that case instructive.

Plaintiff also relies on *Ragnoli v North Oakland-North Macomb Imaging, Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2016 (Docket No. 325206), rev'd 500 Mich 967 (2017). In that case, the plaintiff slipped and fell on black ice in the defendant's parking lot. *Ragnoli*, unpub op at 1. The trial court granted defendant summary disposition on the basis that no genuine issues of material fact existed regarding whether the black ice was a dangerous condition that was open and obvious. *Id*. We reversed, and noted the plaintiff's allegations that she could not see the ice due to a lack of lighting in the parking lot. *Id.* at 2. Our decision was reversed by the Michigan Supreme Court, which noted: "The trial court correctly held that, notwithstanding the low lighting in the parking lot, the presence of wintery weather conditions and of ice on the ground elsewhere on the premises rendered the risk of a black ice patch open and obvious such that a reasonably prudent person would foresee the danger of slipping and falling in the parking lot." *Ragnoli v North Oakland-North Macomb Imaging, Inc*, 500 Mich 967, 967 (2017). Plaintiff has overlooked *Ragnoli*'s reversal, and subsequently failed to address how the case is helpful to her position in light of the same.

With all of the above in mind, we conclude that the trial court did not err in determining that no genuine issues of material fact existed with respect to whether defendant caused or had reason to know of the lighting condition on the patio when plaintiff fell and was injured.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ Jonathan Tukel