STATE OF MICHIGAN

COURT OF APPEALS

KELVIN WILSON,

Plaintiff-Appellant,

v

DETROIT ENTERTAINMENT, LLC, doing business as MOTORCITY CASINO HOTEL,

Defendant-Appellee.

UNPUBLISHED
July 22, 2021

No. 354412
Wayne Circuit Court
LC No. 19-001678-NO

Before: TUKEL, P.J., and SAWYER and CAMERON, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting summary disposition to defendant. Plaintiff contends on appeal that the trial court erred in granting summary disposition to defendant when it did not view the evidence in the light most favorable to him as the nonmoving party when it granted defendant's motion for summary disposition. Plaintiff also argues the trial court erred when it denied plaintiff's motion for reconsideration. We affirm.

I. FACTUAL BACKGROUND

Plaintiff was injured in a slip and fall in defendant's business, Motorcity Casino. The day of the accident, plaintiff was playing slots at the casino when he got up to use the restroom. Plaintiff testified that he opened the door to the restroom, walked in, turned the corner, and slipped within seconds. As he entered the restroom, plaintiff was looking straight ahead to the stall he was going to enter, not looking down. He did not see a wet floor sign or anything on the ground. When plaintiff slipped, both legs went into the air, he fell first on his left shoulder, then his head, then his buttocks. When asked what he slipped on, plaintiff believed it was a wet, oily floor and conjectured that it could have been condensation from the humid weather, soap, or water, but he did not know what caused him to slip. He also characterized the floor as damp and slimy. While plaintiff was on the ground after the fall, he did not feel any substances on the floor nor did his clothing became damp from the floor.

Another patron in the restroom went for help, and security guards arrived to assist plaintiff. Plaintiff testified that he was feeling frustrated that one of the guards took photographs instead of

helping him off the floor. The two guards eventually loaded plaintiff into a wheelchair and took him to the casino's medical office. They then asked plaintiff if he wanted to see a doctor, and plaintiff said he wanted an ambulance. An ambulance arrived within about 10 to 15 minutes. Plaintiff was put in a neck brace, loaded into the ambulance, and taken to Detroit Receiving Hospital. From the fall, plaintiff suffered a rotator cuff injury and a closed head injury.

Defendant's employee, security officer and emergency medical technician Nicholas Luschas, prepared an incident report regarding plaintiff's fall. The report was consistent with plaintiff's testimony regarding the incident, but the report noted there was a wet floor sign present in the bathroom at the time Luschas responded to plaintiff's fall. The incident report also includes an engineering report from less than an hour after plaintiff's fall that says the restroom floor where plaintiff fell was clean and dry at the time of inspection, but does not indicate whether a wet floor sign was found at the time.

Defendant filed a motion for summary disposition under MCR 2.116(C)(10). Defendant argued that although plaintiff's complaint alleged there was a slippery, oily, and wet substance on the restroom floor, he had not come forward with any evidence of what actually caused him to fall. And the fact that there was a wet floor sign in the restroom provided warning of any slippery condition which may have existed on the restroom floor. Further, defendant argued this action sounds in premises liability only, and not negligence, because plaintiff's injuries were caused by a condition on the land.

Plaintiff argued in response that his claims sound in both negligence and premises liability because the negligence claim arose from the actions of defendant's employees and the premises liability claim arose from the condition on the restroom floor. Plaintiff contended there were questions of material fact as to whether the substance on the restroom floor was open and obvious, whether a wet floor sign was in place at the time of plaintiff's fall, and whether the sign was adequate to warn of the danger.

The court granted defendant's motion for summary disposition. The court hand-wrote on the order: "Due to virus concerns, MCR 2.119(E)(3) [dispensing of oral argument at the court's discretion]. We adopt the rational[e] set forth in [defendant's] brief. Specifically the presence of the wet floor sign." Plaintiff filed a motion for reconsideration. He first argued that the trial court improperly accepted defendant's version of the facts when deciding its motion for summary disposition. Plaintiff also argued that defendant's motion for summary disposition was supported by inadmissible hearsay and, if that evidence was properly excluded, then there was no evidence that there was a wet floor sign in the restroom at the time of plaintiff's fall. Defendant's motion for summary disposition should, therefore, have been denied and plaintiff's motion for reconsideration granted. The court entered an order denying plaintiff's motion for reconsideration, again hand-writing on the form that the hearing was dispensed with "due to virus concerns" and that the motion was denied because there was "no palpable error."

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition. We disagree.

This Court reviews de novo a trial court's granting or denial of a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "A motion made under MCR 2.116(C)(10) tests the factual sufficiency of a claim, and when the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law." *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). "In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party." *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 102; 804 NW2d 569 (2010). "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 might differ." *Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).

Plaintiff first contends that his claim sounds in both ordinary negligence and premises liability. We disagree. A premises liability claim does not necessarily preclude another claim based on a defendant's conduct. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). However, "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691; 822 NW2d 254 (2012). "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis*, 296 Mich App at 692. "Ordinary negligence claims are grounded on the underlying premise that a person has a duty to conform his or her conduct to an applicable standard of care when undertaking an activity." *Lymon v Freedland*, 314 Mich App 746, 756; 887 NW2d 456 (2016). On the other hand, "[i]n a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Laier*, 266 Mich App at 493. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis*, 296 Mich App at 692. Here, plaintiff's claims sound only in premises liability and not ordinary negligence because his injuries were caused by alleged conditions on the land, not defendant's actions.

This Court has held that a claim sounded only in premises liability and not ordinary negligence when the defendant was physically assisting the plaintiff during her fall. *Jahnke v Allen*, 308 Mich App 472, 476; 865 NW2d 49 (2014). In that case, the plaintiff and the defendant lived on adjoining property and regularly socialized. *Id*. at 473. As they socialized late one evening, the plaintiff had a dizzy spell caused by a medical condition, and the defendant linked arms with her and attempted to walk her home. *Id*. The plaintiff slipped where some pavers had been removed for construction, fell, and pulled the defendant on top of her in the fall. *Id*. This Court held that the plaintiff's claim sounded only in premises liability because her fall was caused by the missing pavers, not the defendant's act of trying to assist her while she walked. *Id*. at 476. The Court noted that the plaintiff could not avoid summary disposition on her premises liability claim merely by trying to frame it as a negligence claim. *Id*.

Similarly, plaintiff's claim sounds only in premises liability, and not negligence, because his injuries were caused by the alleged condition on defendant's land and not because of defendant's actions. Plaintiff testified that he suffered injuries to his head and shoulder when

slipping on the restroom floor. He testified that defendant's employees tended to the wound on his head, helped him into a wheelchair, wheeled him to the casino's medical room, and called him an ambulance. Plaintiff has not come forward with any evidence that the actions of defendant's employees, apart from the alleged condition on the land, caused or exacerbated any of his injuries. As such, like in *Jahnke*, plaintiff's claim sounds only in premises liability.

The Michigan Supreme Court has stated that there are two general precepts to premises liability law in Michigan. *Hoffner*, 492 Mich at 459. "First, landowners must act in a reasonable manner to guard against harms that threaten the safety and security of those who enter their land." *Id*. Second, landowners are not insurers and are not responsible for guaranteeing the safety of everyone who enters their land. *Id*. "Underlying all these principles and rules is the requirement that both the possessors of land and those who come onto it exercise common sense and prudent judgment when confronting hazards on the land." *Id*.

To assert a claim for premises liability, a plaintiff must prove the four elements of a negligence claim: "(1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). It is undisputed that plaintiff was an invitee on defendant's property. "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." *Hoffner*, 492 Mich at 460. A landowner is liable for breaching his duty when he or she knows or has reason to know of a dangerous condition on the land the invitee is unaware of and "fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Id*.

Plaintiff has not created a question of fact regarding whether a dangerous condition even existed, because he has not come forth with any evidence of what he actually slipped on. Plaintiff's testimony only provided speculation and conjecture that he slipped on a wet and oily floor; his testimony was that the fall may have been caused by soap, water, or condensation from the humid weather, but he was not sure exactly what caused his fall. It is well-settled that a party cannot rely on speculation and conjecture to create a question of fact at the summary disposition stage. *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 723; 909 NW2d 890 (2017). Summary disposition is appropriate on that basis. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994) ("To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."). We will nevertheless address the parties' alternative arguments.

The parties disagree over whether defendant had notice of an alleged dangerous condition in the restroom plaintiff fell in. To establish a premises liability claim, a plaintiff "must be able to prove that the premises possessor had actual or constructive notice of the dangerous condition at issue[.]" *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 9; 890 NW2d 344 (2016). It is a plaintiff's burden to establish evidence that the defendant had actual or constructive notice of the condition. *Id*. at 8-9. When a plaintiff does not come forward with evidence of notice, a "[d]efendant is not required to go beyond showing the insufficiency of plaintiff's evidence." *Id*. at 9. The only evidence that defendant had notice of a dangerous condition in the restroom was the wet floor sign placed in the bathroom, which plaintiff argues alternatively was not present. Plaintiff has not brought forth additional evidence that any of defendant's employees knew of the condition before plaintiff's fall. Nor does he identify how long the dangerous condition existed and whether

defendant's employees should have discovered the condition. However, viewing the evidence in the light most favorable to the nonmoving party and drawing reasonable inferences in his favor, a question of fact exists as to whether defendant was on notice of a dangerous condition because of the wet floor sign. It is reasonable to infer that the wet floor sign was placed by one of defendant's employees when the floor was, in fact, wet. So there exists a question of fact as to when and why the wet floor sign was placed.

The parties next disagree over whether a question of fact exists regarding whether the alleged dangerous condition in the restroom was open and obvious. A hazard is open and obvious when "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461. Thus, there is no duty to warn of open and obvious hazards because the average person would appreciate the dangerous condition and take steps to avoid it. *Id*. "Accordingly, it is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001).

This Court addressed similar facts to this case in *Watts*, 291 Mich App at 98. In that case, the plaintiff slipped on a recently mopped floor in the defendant's restaurant, which did not show signs of being wet. *Id*. at 99-100. When the plaintiff stood up after the fall, she noticed her clothes were damp from the floor and there was a mark left on the floor from where she had fallen. *Id*. at 100. She testified that she observed the floor, did not see anything on the floor, and she saw no wet floor signs. *Id*. The defendant's incident report indicated that there were wet floor signs present. *Id*. at 101. The Court reversed the granting of summary disposition for the defendant. *Id*. at 105. The Court reasoned that it was undisputed that the floor was recently mopped and wet, but the wetness was not visible upon casual inspection, so the hazard could not have been open and obvious. *Id*. at 104-105.

Unlike in *Watts*, there is no question of fact here that the hazard was open and obvious because an average person of ordinary intelligence could have perceived a hazardous condition in the restroom in which plaintiff fell. In *Watts*, it was undisputed that the floor the plaintiff slipped on had been recently mopped and was still wet. *Id*. at 103. Here on the other hand, the only evidence plaintiff has brought forth of a slippery condition is his own testimony, in which he speculates the floor might not have been adequately cleaned, there may have been soap and water on it, or that condensation may have formed on the floor from the humid weather. Assuming for the sake of argument some condition on the restroom floor caused plaintiff's fall, the question is whether an average person of ordinary intelligence would have discovered that condition upon casual inspection. There is no evidence that the floor in the restroom where plaintiff fell had been recently mopped, leaving it in a wet condition like in *Watts*, or that there was standing water or a puddle. This is supported by plaintiff's testimony that his clothes did not become wet from the floor. However, plaintiff testified that it was known to frequent patrons of defendant's business that the restrooms were sometimes left in unclean conditions. He also testified that he believed the humid weather was causing condensation to accumulate on shiny surfaces within the casino. And he testified that he noticed the dampness he attributed to condensation in a different restroom earlier in the day. This would put the average person on notice that a slippery condition on the bathroom floor may exist and steps should be taken to avoid any danger. Although it is in dispute exactly when and why the wet floor sign was placed, defendant has presented evidence in the

incident report and photograph, which plaintiff has not refuted, that the wet floor sign was present at the time of plaintiff's fall. The hazardous condition of the bathroom floor, according to plaintiff's evidence, at most consisted of dampness caused by humidity, soap, or water; however, from the conditions of the restrooms generally, as previously experienced by plaintiff on the same day, and the presence of a wet floor sign in the restroom, an average person of ordinary intelligence would know to take care to avoid a potential slipping hazard. As such, no question of fact exists as to whether the condition of the restroom floor created an open and obvious hazard.

Plaintiff last argues that, even if the condition was open and obvious, it had special aspects. There is a narrow exception to the open and obvious doctrine for hazards with special aspects, meaning the risk of harm is still unreasonable even though the danger is readily apparent. *Lugo*, 464 Mich at 517. A hazard may fall under the special aspects exception when the hazard is either effectively unavoidable or it imposes an unreasonably high risk of severe harm. *Id*. at 518. The Court offered as an example of an effectively unavoidable condition one in which the only exit to a building is covered in standing water, and it offered as an example of an unreasonably high risk of severe harm an unguarded, 30-foot pit in a parking lot. *Id*. Under this standard, there were no special aspects to the condition in this case. The hazard was not effectively unavoidable because there were other restrooms available in the casino, at least one of which plaintiff had used earlier in the day without incident. And there was not an unreasonably high risk of severe harm because slipping on the hazard would only result in a short, rather than extended, fall. *Id*. at 520.

In sum, plaintiff's claim only sounds in premises liability, plaintiff has not created a genuine issue of material fact on his claim because he has only brought forth speculation as to what caused him to fall in defendant's restroom, and the danger presented was open and obvious without special aspects.

III. MOTION FOR RECONSIDERATION

Plaintiff contends that the trial court abused its discretion by denying his motion for reconsideration. We again disagree.

"This Court reviews for an abuse of discretion a trial court's ruling on a motion for reconsideration." *Sanders v McLaren-Macomb*, 323 Mich App 254, 264; 916 NW2d 305 (2018). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Auto-Owners Ins Co v Compass Healthcare PLC*, 326 Mich App 595, 607; 928 NW2d 726 (2018) (quotation marks and citation omitted). "MCR 2.119(F)(3) requires the party moving for reconsideration to 'demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.' " *Sanders*, 323 Mich App at 264, quoting MCR 2.119(F)(3).

Plaintiff first argues that the trial court erred in not granting his motion for reconsideration on the basis that the trial court accepted defendant's version of facts as true, which is improper under the standard of review for a motion under MCR 2.116(C)(10). The trial court's written reasoning for granting defendant's motion for summary disposition provides little insight. The court's entire reasoning was as follows: "We adopt the rational[e] set forth in [defendant's] brief. Specifically the presence of the wet floor sign." Whether the trial court wholly adopted defendant's version of the facts, or whether it adopted defendant's rationale that there was adequate warning given by the wet floor sign, is unknowable. But "[t]his Court, however, will not reverse

when a trial court reaches the right result for a wrong reason." *Neville v Neville*, 295 Mich App 460, 470; 812 NW2d 816 (2012). Under de novo review above, it was shown that defendant presented evidence that a wet floor sign was placed in the restroom at the time of plaintiff's fall, and plaintiff did not come forth with evidence that there was no wet floor sign at the time. As such, plaintiff has not shown an issue of fact on whether defendant met its duty to warn. So plaintiff has not shown palpable error which misled the court.

Next, plaintiff challenges whether the photograph and incident report attached as exhibits to defendant's motion for summary disposition were substantively admissible and properly considered by the trial court. MCR 2.116(G)(6) provides that "[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." This means that the proffered evidence must be admissible in content, although it does not have to be in admissible form to be properly considered. *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009).

Plaintiff contends that the trial court improperly relied upon the photographic evidence of the wet floor sign, which was not authenticated. More specifically, plaintiff contends that there is no way to know from the photograph itself if it is representative of what defendant purports it to be. For a photograph to be admissible, it is not necessary for the person who took the photograph to testify. *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 133; 492 NW2d 761 (1992). "To lay a proper foundation for the admission of photographs, a person familiar with the scene depicted in the photograph must testify, on the basis of personal observation, that the photograph is an accurate representation." *Id*. It is true, as plaintiff points out, that defendant has not identified who took the photograph of the wet floor sign. But plaintiff testified that one of the security guards who responded to his fall was taking photographs of the bathroom before helping plaintiff up, so there is evidence that someone was taking photographs of the restroom as it was immediately after plaintiff's fall. Further, Luschas, who authored the incident report that noted the presence of the wet floor sign, could certainly testify that the photograph is a fair representation of the restroom shortly after plaintiff's fall. As such, the photograph of the wet floor sign was admissible in content and the trial court did not abuse its discretion or commit palpable error when it relied on the photograph.

Lastly, plaintiff argues that the incident report created by defendant's employee does not fall under the business record exception to the rule against hearsay because it lacks trustworthiness. MRE 803(6), the business records exception, provides that any records, report, or other writings that are regularly kept in the course of business are admissible as evidence, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." MRE 803(6). Regarding trustworthiness under the business record exception, the Michigan Supreme Court has explained:

> Thus . . . MRE 803(6) provide[s] that trustworthiness is presumed, subject to rebuttal, when the party offering the evidence establishes the requisite foundation. Even though proffered evidence may meet the literal requirements of the rule, however, the presumption of trustworthiness is rebutted where the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Consequently, in cases like the present, the trial court, upon a

> party's timely objection, must determine as a question of admissibility whether the proffered evidence lacks trustworthiness. [*Solomon v Shuell*, 435 Mich 104, 125-126; 457 NW2d 669 (1990) (quotation marks omitted).]

Plaintiff argues that the incident report lacks an author. Plaintiff is mistaken. The incident report states that it was authored by Luschas, and the attached engineering report names an author and is signed, although the writing is illegible. Under *Solomon*, Luschas and the engineering report's author could testify to establish the foundation for admission of the reports, and the trustworthiness of the reports would be presumed. Plaintiff could then object on the grounds of untrustworthiness, and it would be within the trial court's discretion to determine whether the evidence lacks trustworthiness and should be excluded. *Id*. at 122, 125-126. A business record loses its presumption of trustworthiness when it was prepared in anticipation of litigation. *Id*. at 131. There is no indication from the evidence that the incident report and attached engineering report were made for the purpose of litigation and not in the normal course of business. The reports indicate they were made by the employees within about an hour and a half of plaintiff's fall. They appear to be made on standard forms. The incident report included facts that were consistent with plaintiff's testimony. The engineering report simply stated that the restroom floor was clean and dry at the time of inspection, and the form has a check box for whether the incident being responded to was a slip and fall. It appears from the evidence that these were the standard forms filled out for a slip and fall in defendant's normal course of business. As such, it is not an abuse of discretion to find the reports fell under the business records exception.

Further, plaintiff did not raise a challenge to the incident report in its response brief to defendant's summary disposition motion; he first raised it in his motion for reconsideration. As this Court has held, "[t]he trial court does not abuse its discretion by rejecting arguments made in a motion for reconsideration that could have been made in response to the original motion." *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 150; 946 NW2d 812 (2019). Put another way, it is within the discretion of a trial court to deny a motion for reconsideration simply for the reason a party could have made the argument previously. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). So the trial court was also within its discretion to deny the motion for reconsideration on the ground that plaintiff did not raise this argument at the summary disposition stage. *Id*.

IV. CONCLUSION

Plaintiff's claim sounds only in premises liability, and summary disposition for defendant was appropriate. Furthermore, the trial court did not abuse its discretion by denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Jonathan Tukel
/s/ David H. Sawyer
/s/ Thomas C. Cameron