STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL ALBITUS,

Plaintiff-Appellant,

v

GREEKTOWN CASINO, LLC,

Defendant-Appellee,

and

GARY PLATT MANUFACTURING COMPANY,

Defendant.

FOR PUBLICATION
December 16, 2021
9:25 a.m.

No. 356188
Wayne Circuit Court
LC No. 19-000950-NO

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant[1] Greektown Casino in this premises liability action. We affirm.

I. BACKGROUND

On October 23, 2016, plaintiff allegedly suffered injuries after falling from a chair on the premises of defendant's casino. Plaintiff contended that he was sitting at a slot machine and fell when the back of the chair gave way or collapsed. According to plaintiff, the fall caused a fractured right arm, torn shoulder, and neck injury, and these injuries required extensive medical treatment. Plaintiff filed a complaint alleging in relevant part that defendant was responsible for the defective

[1] Defendant Gary Platt Manufacturing Company, the manufacturer of the chair at issue, settled with plaintiff and is not involved in this appeal. Thus, the term "defendant" refers to Greektown Casino, LLC.

chair and liable for his injuries. Plaintiff asserted three separate counts, one each for general negligence, premises liability, and breach of implied warranty.

On April 29, 2020, defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that premises liability was the only viable theory of liability and plaintiff could not establish that defendant had actual or constructive notice of the allegedly defective chair. Defendant referred to plaintiff's testimony that the chair appeared normal before he sat on it and, after he sat on it, the chair felt normal. Defendant further argued there was no evidence that defendant knew or should have known of the allegedly defective condition of the chair or that the defect even existed prior to plaintiff using the chair. In other words, there was no evidence that the chair was obviously defective, that defendant had been notified that the chair was broken, or that someone else had fallen or had an incident involving the chair. Plaintiff responded, arguing that defendant knew or should have known about the defective chair because of its 24-hour surveillance of the incident area and its numerous employees in that area responsible for patron safety. Plaintiff stressed testimony from defendant's risk and safety manager confirming the area was under constant surveillance and that numerous employees in the area were responsible for monitoring safety, including the safety of the slot-machine chairs. Plaintiff also argued that the defect could be seen in the surveillance video before plaintiff's injury.

At a hearing held on the motion, defendant presented the trial court with the video surveillance from the incident, countering plaintiff's assertion that a defect in the chair was observable upon casual inspection before plaintiff fell. Plaintiff responded that his safety expert stated in his affidavit that a defect was observable in the video in that the chair back leaned backwards further than the chair backs adjacent to it. Plaintiff further argued that defendant had a duty to inspect the premises to protect invitees from hazardous conditions and had constructive notice of the defect because it had 24-hour surveillance and numerous employees in the area of the incident. According to plaintiff, had defendant and its employees done their jobs and properly inspected the premises, the defect would have been discovered and plaintiff's injuries prevented.

The trial court ultimately granted defendant's motion for summary disposition on all three of plaintiff's claims. The trial court agreed with defendant that this was solely a premises liability action. And regarding that claim, the trial court concluded plaintiff failed to meet his burden of showing defendant had actual or constructive notice of any defect in the chair, stressing the chair's normal appearance and plaintiff's own testimony that the chair looked and felt normal. As for the surveillance video, the trial court indicated that it did not show that the chair was defective. The trial court also disagreed with plaintiff's contention that defendant, as a premises owner, had a duty to routinely inspect for hazardous conditions. Specifically, the trial court concluded that the recent case of *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1; 890 NW2d 344 (2016), abolished the prior duty-to-inspect requirement under Michigan law. Subsequently, plaintiff's motion for reconsideration was denied and this appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(10) "tests the *factual sufficiency* of a claim." *Id*. at 160. The moving party must identify the matters that have no disputed factual issues, and has the initial

burden of either submitting affirmative evidence negating an essential element of the nonmoving party's claim or demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of their claim. *Lowrey*, 500 Mich at 7, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The party opposing the motion must then establish by evidentiary materials that a genuine issue of disputed fact exists. *Quinto*, 451 Mich at 362-363. After considering the documentary evidence submitted in the light most favorable to the nonmoving party, the court determines whether a genuine issue of material fact exists to warrant a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks and citation omitted). Issues of law are also reviewed de novo. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008).

III. ANALYSIS

Plaintiff contends the trial court erred in concluding that 1) *Lowrey* dispensed with the requirement that premises owners conduct reasonable inspections to protect patrons from hazards on the property, and 2) plaintiff presented insufficient evidence to create a genuine issue of material fact regarding defendant's constructive notice of the defective chair. We agree that the trial court misconstrued *Lowrey*, but disagree that the trial court erred in granting defendant summary disposition on the basis of the lack of notice.

It was undisputed below that plaintiff was an invitee of defendant's business when the alleged injury occurred. To prevail on a premises liability claim, "an invitee must show that the premises owner breached its duty to the invitee and that the breach constituted the proximate cause of damages suffered by the invitee." *Lowrey*, 500 Mich at 8. Breach occurs if the premises owner knows or should have known of a dangerous condition and fails to protect invitees via repair, warning, or other appropriate mitigation of the danger under the given circumstances. *Id*. Thus, actual or constructive notice of the relevant dangerous condition is an essential element in establishing a premises liability claim. *Id*. at 8-9. Plaintiff never claimed that defendant had actual notice of the dangerous condition; rather, plaintiff claimed that defendant had constructive notice. Constructive notice is present when "the hazard was of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it." *Id*. at 11-12.

Plaintiff first argues the trial court erred in concluding that *Lowrey* abolished a premises owner's duty to inspect for hazardous conditions on the property. We agree. Plaintiff correctly notes that the duty of premises owners to inspect for dangers on behalf of invitees is a longstanding principle of Michigan law. See, e.g., *Price v Kroger Co of Mich*, 284 Mich App 496, 500; 773 NW2d 739 (2009) (noting that a property owner owes business invitees a duty to inspect the premises for hazards that might cause injury). Contrary to the trial court's conclusion, *Lowrey* explicitly affirmed this duty to inspect. See *Lowrey*, 500 Mich at 10 n 2 ("We have described the duty a landowner owes to an invitee as [an] obligation to also make the premises safe, which requires the landowner to inspect the premises . . . .") (quotation marks and citation omitted; alteration in original). Rather than dispensing with the duty to inspect, *Lowrey* merely clarified how this duty operates at the summary disposition stage of a proceeding. Specifically, the Court determined that a defendant need not "present evidence of a routine or reasonable inspection . . . to prove a premises owner's lack of constructive notice of a dangerous condition on its property."

Id. at 10. Only when the plaintiff has successfully established a question of fact regarding constructive notice might evidence of inspection efforts be needed for the defendant to "negate[] an essential element of the nonmoving party's claim[]." See *id*. at 7. Otherwise, a defendant can meet its burden simply by demonstrating "that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." See *id*. at 7. And that is precisely what defendant asserts it has demonstrated here. Therefore, while plaintiff is correct that defendant was still bound by a duty to inspect the premises, this appeal ultimately depends on whether plaintiff provided sufficient evidence to establish a genuine issue of fact concerning the element of constructive notice.

As for this issue, plaintiff argues he provided sufficient evidence that defendant had constructive notice of the defective chair through the testimony of defendant's risk and safety manager and the affidavit of plaintiff's expert. Plaintiff also argues that an issue of fact exists when expert testimony indicates that the defendant would have discovered the dangerous condition through reasonable inspection, as his expert claimed in the instant case. Defendant counters that plaintiff's proffered evidence cannot establish an issue of fact regarding constructive notice because the defect was latent, i.e., it was not discoverable even through reasonable inspection. Defendant also stresses the lack of any evidence indicating that the defect had existed for a sufficient amount of time to impute notice to defendant.

As an initial matter, defendant is correct that no evidence was presented proving that the defect had "existed [for] a sufficient length of time that [defendant] should have know[n] of it." *Lowrey*, 500 Mich at 10 (citation omitted). In fact, the evidence presented arguably indicates the contrary. Plaintiff relies on defendant's safety manager's testimony regarding defendant's use of 24-hour surveillance and employees regularly patrolling the casino floor to imply some failure in defendant's duty to reasonably inspect the premises. But plaintiff fails to explain how these inspection practices were unreasonable and offers no evidence of negligent deviation from these practices. Thus, without some additional evidence that the defect existed for some significant amount of time before plaintiff's fall or of some other negligent action, this testimony merely affirms that defendant had proper practices in place for detecting potential hazards. And defendant's safety manager specifically recognized that no employees were made aware of any issue with the chair, either through prior incidents, customer complaints, or their own inspection practices. From this evidence, the more reasonable explanation is that the defect either had not existed for an amount of time that it should have been detected and fixed, or that the nature of the defect itself made it undiscoverable regardless of when it arose.

We next consider whether the alleged defect was "of such a character . . . that [defendant] should have know[n] of it." *Lowrey*, 500 Mich at 10 (citation omitted). Though plaintiff's safety expert's affidavit[2] largely focused on proper inspection of the premises and defendant's alleged

[2] Defendant also argues that the testimony of plaintiff's expert must be discounted because the expert's opinion infringed on legal questions reserved for the court and was made without the requisite personal knowledge relating to defendant's notice. We only briefly address this argument here because it is largely irrelevant to constructive notice in this case and not dispositive to the issue at hand. Regarding portions of the affidavit actually relevant to constructive notice and

failure to detect the defect (but did not allege any specific negligent action related to defendant's inspection), the expert's testimony relating to the condition of the chair in the video seems to address this prong of constructive notice. According to the expert's specific testimony, the surveillance video showed the defect in the chair because it visibly leaned backward farther than adjacent slot-machine chairs—allegedly because of a deformed metal support.

The surveillance footage in question provides two separate angles of the incident, one from behind and one from the side, as well as a close-up view of the chair after plaintiff's fall. The video depicts plaintiff seating himself in the chair and turning his attention to the slot machine. After approximately 40 seconds, plaintiff leans back in the chair, at which point the backrest appears to buckle and plaintiff falls. Though plaintiff's expert is correct that the backrest appears broken in the close-up footage from *after* plaintiff's fall, the chair looks completely normal up until that event. As plaintiff approaches the chair and sits down, it appears just like all the other chairs in the vicinity; only once plaintiff leans back does the defect become apparent.

We therefore agree with the trial court that the surveillance video shows no significant underlying defect that should have been discovered—giving rise to constructive notice of a dangerous condition. Even assuming arguendo that the chair back did lean backward a bit further than the chair backs of adjacent chairs, we do not believe that it was of such a character that "reasonable minds might differ" on the issue of constructive notice. See *Johnson*, 502 Mich at 761. A backrest on a chair leaning a bit farther back than others, without more, simply does not show that defendant should have known a dangerous defect was present, i.e., that the chair back was going to collapse. The expert's testimony regarding the chair's condition was thus insufficient to create a genuine issue of material fact regarding defendant's constructive notice, an essential element of plaintiff's claim. Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

analyzed in this discussion, they relate specifically to factual assertions over which plaintiff's expert did acquire the required personal knowledge.