Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2023

164283

CHRISTINE SIRREY,
Plaintiff-Appellant,

v

SC: 164283
COA: 356323
Macomb CC: 2020-000733-NO

J DELL HAIR STUDIO, LLC,
Defendant-Appellee.

_____/

By order of July 28, 2022, the application for leave to appeal the March 10, 2022 judgment of the Court of Appeals was held in abeyance pending the decisions in *Kandil-Elsayed v F & E Oil, Inc* (Docket No. 162907) and *Pinsky v Kroger Co of Mich* (Docket No. 163430). On order of the Court, these cases having been decided on July 28, 2023, 512 Mich ___ (2023), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals to the extent that it is inconsistent with our decision in *Kandil-Elsayed* and *Pinsky*, and REMAND this case to that court for reconsideration in light of *Kandil-Elsayed* and *Pinsky*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 28, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE SIRREY,

Plaintiff-Appellee,

v

J DELL HAIR STUDIO,

Defendant-Appellant.

UNPUBLISHED
March 10, 2022

No. 356323
Macomb Circuit Court
LC No. 2020-000733-NO

Before: BOONSTRA, P.J., and RONAYNE KRAUSE and CAMERON, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the trial court's order denying its motion for summary disposition. We reverse and remand for entry of an order granting summary disposition in favor of defendant.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On Sunday, March 5, 2017, plaintiff was a patron at defendant's hair salon; defendant had opened for business that day specifically to perform hairstyling and makeup for plaintiff's daughter and her wedding party. Plaintiff slipped and fell while on the premises and allegedly was injured. Defendant's owner, Janan Delly (Delly), had styled plaintiff's hair, but had waited to style her bangs until after her makeup was finished. While plaintiff was getting her makeup done, Delly's young niece and nephew entered the salon, and Delly cut their hair. According to plaintiff, while she was waiting to have her bangs styled, Delly came to the makeup chair in which plaintiff was sitting and instructed her to follow Delly to her salon chair. By contrast, Delly testified at her deposition that she was in the back of the salon retrieving a broom to sweep up her niece's and nephew's hair when plaintiff fell, and that plaintiff had walked to Delly's salon chair of her own accord.

[1] *Sirrey v J Dell Hair Studio*, unpublished order of the Court of Appeals, entered May 26, 2021 (Docket No. 356323).

In any event, as plaintiff approached the salon chair, she slipped on what she later identified as hair clippings on the floor, and alleged that she had sustained injuries. Although she admitted to not watching the floor as she was walking, plaintiff opined at her deposition that she would not have seen the hair clippings if she had glanced at the floor, given that the hair and defendant's floor were both dark; however, she also stated that she "probably" would have seen the hair on the floor if she had been looking at the floor while she was walking, and that she had not expected hair to be on the floor because the salon was not open. However, Delly testified that the salon floor was a light gray color. In a photograph provided to the trial court by defendant, the salon floor around the chair appears light or medium gray, with dark mats covering portions of the floor; in another photograph of a different portion of the salon floor, the floor appears light brown or gray. Plaintiff indicated that there were a lot of hair clippings on the floor in a two-foot area along the back of the salon chair.

Plaintiff filed suit, alleging that defendant had breached its duty as a premises owner and had caused her injury. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that the open and obvious doctrine barred plaintiff's claim, and that the hair clippings on the floor had no special aspects that would preclude application of the open and obvious doctrine. The trial court denied defendant's motion, holding that there was a substantial dispute regarding the open and obvious nature of the hair clippings on the salon floor. Defendant moved for reconsideration, which the trial court denied. This appeal followed.

II. STANDARD OF REVIEW

"This Court . . . reviews de novo a trial court's decision on a motion for summary disposition." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015). We "review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . 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 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 may differ." *Id*.

This Court reviews de novo the interpretation of administrative rules. *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003). "The rules of statutory construction apply to both statutes and administrative rules." *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). "The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019) (quotation marks and citations omitted). "[W]here the statutory language is clear and unambiguous, that statute must be applied as written." *Id*. (quotation marks and citations omitted, alterations in original).

III. OPEN AND OBVIOUS DOCTRINE

Defendant argues that the trial court erred by denying defendant's summary disposition motion, because the hair clippings on defendant's floor constituted an open and obvious danger. We agree.

To prevail on a claim of negligence, a plaintiff must prove: "(1) duty, (2) breach, (3) causation, and (4) damages." *Hannay v Dep't of Transp*, 497 Mich 45, 63; 860 NW2d 67 (2014). For a negligence claim brought under a theory of premises liability, the premises possessor's duty is dependent on the status of the plaintiff at the time of the injury. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). "A premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, "[a]bsent special aspects, this duty does not extend to open and obvious dangers." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012). "Whether a danger is open and obvious is judged from an objective standard, considering whether it was reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Estate of Goodwin v Northwest Fair Ass'n*, 325 Mich App 129, 158; 923 NW2d 894 (2018) (quotation marks and citations omitted). Indeed, "there is an overriding public policy that people should [']take reasonable care for their own safety.[']" *Buhalis*, 296 Mich App at 693.

Defendant argues that the hair clippings on defendant's floor constituted an open and obvious danger, while plaintiff contends they did not because she did not see the hair before she fell. However, plaintiff also admitted she was not watching the floor where she was walking. "[I]f a [']condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger.[']" *Buhalis*, 296 Mich App at 694. This standard is an objective one, and the question is whether "an average person with ordinary intelligence would have discovered it upon casual inspection." *Estate of Goodwin*, 325 Mich App at 158.

Even if plaintiff did not see the hair on the floor before she fell, she has failed to establish that the hair would not have been discoverable on casual inspection. *Id*. Moreover, plaintiff admitted that she knew hair salons have hair on the floor at times, and further admitted that the hair might have been visible had she looked down at the floor. Viewed in the light most favorable to the plaintiff, there is no genuine issue of material fact that the hair clippings were open and obvious, despite plaintiff's failure to discover them prior to her fall. *Buhalis*, 296 Mich App at 694.

Further, the hair clippings possessed no special aspects that made them unreasonably dangerous. Generally, "a premises possessor is not required to protect an invitee[2] from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to

[2] The parties agree that plaintiff was an invitee at the time of the fall.

protect invitees from that risk." *Lugo*, 464 Mich at 517. An open and obvious danger is unreasonably dangerous if it is effectively unavoidable, or if it presents a high risk of severe harm. *Id*. at 518. However, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519. In illustrating this concept, the *Lugo* Court presented two examples: (1) "a commercial building with only one exit for the general public where the floor is covered in standing water;" and (2) "an unguarded thirty foot deep pit in the middle of a parking lot." *Id*. at 518. With respect to the first example, the *Lugo* Court noted the water would be unavoidable, as any customer wishing to exit the store would need to walk through the water. *Id*. As to the second example, the Court determined the pit created a substantial risk of death or severe injury, even though the pit was open and obvious and was likely avoidable. *Id*.

Plaintiff argues that the hair clippings were effectively unavoidable because she was required to walk through them to get to the only salon chair available for Delly to finish plaintiff's hair. Plaintiff also contends that the risk was unavoidable because she otherwise would have been forced to attend her daughter's wedding with her hair unfinished, which she could not do. We disagree.

A hazard is unavoidable when it is "essentially inescapable." *Stimpson v GFI Mgmt Servs, Inc*, 498 Mich 927; 871 NW2d 207 (2015). Plaintiff cites *Estate of Livings v Sage Investment Group*, ___ Mich ___; ___ NW2d ___ (2021) (Docket No. 159692), in support of her argument that "life activities are important enough that a reasonable customer will knowingly face risk to accomplish his or her mission." However, *Estate of Livings* analyzed an employee's decision to enter a workplace despite hazardous weather conditions, and held that, under some conditions, "an open and obvious hazard can become effectively unavoidable if the employee confronted it to enter his or her workplace for work purposes." *Id*. at ___, slip op at 9. In this case, plaintiff does not argue that she would have risked an adverse employment consequence if she had elected not to encounter the hair clippings, but only that she would have been forced to attend her daughter's wedding with incomplete hair and makeup. We find this situation sufficiently distinguishable from *Estate of Livings*; further, in any event, the Supreme Court in *Estate of Livings* made it clear that even in an employment context, "the key [to determining whether a hazard was effectively unavoidable] is whether alternatives were available that would have been used by a reasonable person in the employee's circumstances." *Id*. at ___, slip op at 10.

Although plaintiff disputes that Delly was on her way to get a broom to clean the hair clippings off the floor when plaintiff fell, she nonetheless could have simply asked Delly or another stylist to sweep the hair off the floor, or she could have taken an alternative route to the chair. And plaintiff presented no evidence that there was only one route she could have used to walk to the salon chair. The photograph of the salon chair shows that it was approachable from several directions. Plaintiff stated the hair was on the floor near the back of the chair, but failed to present evidence that she was forced to approach the chair in a way that necessitated an encounter with the clippings. Plaintiff has not established that the hazard was effectively unavoidable. *Lugo*, 464 Mich at 518.

Plaintiff has also provided no evidence that the hair clippings on the floor presented an unreasonable risk of harm, given that plaintiff was in a hair salon, where members of a bridal party

were getting their hair done. Indeed, plaintiff admitted to knowing that hair salons may have hair clippings on the floor. *Id*.

The hair clippings had no special aspects that precluded the application of the open and obvious doctrine. Therefore, the trial court erred by denying defendant's summary disposition motion.

III. MICH ADMIN CODE, R 338.2173(1)

In responding to defendant's motion for summary disposition, plaintiff raised the argument that the open and obvious doctrine does not apply in this case because defendant violated an inspection regulation of the Michigan Department of Licensing and Regulatory Affairs (LARA), Mich Admin Code, R 338.2173(1) (Rule 73). It is not clear that the trial court relied on this argument in denying defendant's motion. However, to the extent the trial court did so, it erred. Plaintiff has not established that a violation of Rule 73 establishes a private cause of action.

Rule 73 states in relevant part that "the licensee or owner of an establishment or school shall keep the establishment or school clean, safe, and sanitary at all times, disposing of temporary waste materials, including, but not limited to, hair clippings, paper, and tissues, after servicing a patron." *Id*. Plaintiff argues that this Court should recognize a private cause of action arising from Rule 73, because courts have recognized that duties may arise under common law or by specific statutory mandates. However, to support her contention, plaintiff cites various cases that discuss a party's breach of duty in relation to the violation of a statute. Plaintiff provides no authority analyzing a breach of administrative regulations, and fails to establish that the proper remedy for violation of Rule 73 is a civil lawsuit rather than administrative proceedings. Specifically, plaintiff cites *Woodbury v Bruckner*, 467 Mich 922; 658 NW2d 482 (2002), which determined that a violation of a statute precluded the use of the open and obvious doctrine. However, we have found no cases extending *Woodbury*'s holding to licensing regulations. Indeed, this Court has distinguished between violations of statutes and violations of codes and ordinances regarding the application of the open and obvious doctrine. See, *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003) (finding that not all building code violations would preclude the application of the open and obvious danger doctrine).

Moreover, a private cause of action cannot be found in or inferred from the language of the Administrative Code or Rule 73 itself. "Where the common law provides no right to relief, but the right to relief is created by statute, a plaintiff has no private cause of action to enforce the right unless (1) the statute expressly creates a private cause of action, or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions." *Lane v Kindercare Learning Ctrs, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998).

Rule 73 is a part of the Administrative Code, and was promulgated by LARA, as authorized by Michigan's Occupational Code, MCL 339.101 *et seq*. Specifically, MCL 339.1203(1) allows LARA to "promulgate rules that establish sanitation standards that the department considers necessary." In addition, MCL 339.501 states:

> A complaint which alleges that a person has violated this act or a rule promulgated or an order issued under this act shall be lodged with the department.

> The department of attorney general, the department, a board, or any other person may file a complaint. [MCL 339.501.]

Since Rule 73 is a rule issued under Michigan's Occupational Code, the remedy for an alleged violation of the rule is established by MCL 339.501. Generally, "when a right or duty is imposed by statue, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) (quotation marks and citations omitted). The Occupational Code provides for enforcement through: (1) agency investigations, as established by MCL 339.502; (2) inspections, under MCL 339.1203(1); and (3) complaints lodged with LARA, under MCL 339.501. Therefore, the exclusive remedy available to plaintiff for an alleged violation of Rule 73 is for plaintiff to lodge a complaint with LARA. See MCL 339.501; see also *Lane*, 231 Mich App at 689. Therefore, even if defendant violated Rule 73,[3] the violation does not preclude the application of the open and obvious doctrine.[4]

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Thomas C. Cameron

[3] We note that plaintiff did not allege in her complaint that defendant violated Rule 73, but only raised the issue in response to defendant's motion for summary disposition. We further note that, despite the conflict in testimony regarding Delly's actions at the time plaintiff fell, there appears to be no dispute that the hair clippings had only recently fallen on the floor.

[4] Although our dissenting colleague agrees that there is no private right of action for an alleged violation of Rule 73, the dissent endeavors to find an actionable negligence claim independent of a premises liability claim. With respect, however, and apart from the legal merits of that effort and the fact that appellee did not advance that position either in the trial court or in this Court on appeal, the factual scenario posited by the dissent also appears nowhere in plaintiff's complaint, deposition testimony, or brief on appeal.

STATE OF MICHIGAN

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UNPUBLISHED
March 10, 2022

No. 356323
Macomb Circuit Court
LC No. 2020-000733-NO

Before: BOONSTRA, P.J., and RONAYNE KRAUSE and CAMERON, JJ.

RONAYNE KRAUSE, J. *(dissenting)*.

I respectfully dissent, because I find the majority's analysis of the evidence incomplete.

As the majority observes, defendant's owner, Janan Delly, testified that the floor was a light grey color and the hair was a dark contrasting color. However, the majority inappropriately dismisses plaintiff's testimony that the floor was a dark brown color. We have been provided with color photographs of the floor that could support a conclusion that the floor was brown and wood textured. Additionally, there were mats on the floor that are dark colored. Although the color of the hair on the floor was not specifically identified insofar as I can determine, it is a matter of common knowledge that "dark" hair is typically brown to black. Brown hair on a brown floor, or black hair on a black mat, would not necessarily be *objectively* obvious to an ordinary person upon *casual* inspection. *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). The fact that plaintiff did not actually see or actively look for the hair is irrelevant, because the standard is objective. *Id*. The fact that the hair was noticeable after falling on it has little probative value to whether "an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*.

When deciding a motion for summary disposition, we must view the evidence in the light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The courts may not make factual findings when deciding a motion for summary disposition, and the courts must give the non-moving party the benefit of any reasonable doubt. *Lytle v Malady*, 458 Mich 153, 176; 579 NW2d 906 (1998). "[I]f the evidence before [the court] is conflicting, summary disposition is improper." *DeFlaviis v Lord & Taylor, Inc*, 223 Mich 432,

436; 566 NW2d 661 (1997). The color and shade of the floor is highly material to whether the hair would have been objectively open and obvious, and the evidence of the color and shade of the floor is directly conflicting. I respectfully do not share the majority's perception of either photograph depicting the floor as gray rather than brown, but clearly reasonable minds could differ as to what the evidence shows. Summary disposition is therefore improper as to plaintiff's premises liability claim.

I agree with the majority that Mich Admin Code, R 338.2173(1), or LARA "Rule 73," does not appear to confer a private cause of action upon plaintiff. However, violation of an administrative rule can constitute evidence of negligence if the rule was intended to protect persons similarly situated to plaintiff from suffering the kind of injury involved and the violation was a proximate cause of that injury. *Est of Goodwin v Northwest Mich Fair Ass'n*, 325 Mich App 129, 163-164; 923 NW2d 894 (2018). As quoted by the parties, "Rule 73" provided[1] at the time of the fall:

> The licensee or owner of an establishment or school shall keep the establishment or school clean, safe, and sanitary at all times, disposing of temporary waste materials, including, but not limited to, hair clippings, paper, and tissues, after servicing a patron.

The evidence, viewed in the light most favorable to plaintiff, could support a conclusion that defendant breached the above rule by leaving the hair clippings on the floor. "Rule 73" was located in the "Health and Safety" part of LARA's rules regarding cosmetology. Although subject headings are not part of statutes[2] and are poor evidence of the legislature's intent, they may provide inferential support for a conclusion derived from the language of a statute. See *Camaj v S.S. Kresge Co*, 426 Mich 281, 298; 393 NW2d 875 (1986). The plain language of "Rule 73" shows that it is intended, in part, to ensure the premises are safe; the location of "Rule 73" supports that conclusion. The obvious class of persons to be protected by the rule would be both employees and patrons, and the obvious hazard of hair clippings on the floor would be slipping and falling. Therefore, plaintiff was a person intended to be kept safe by the rule, she suffered an injury the rule was intended to guard against, and violation of the rule was a proximate cause of plaintiff's injury. Therefore, although "Rule 73" does not confer a cause of action upon plaintiff, it does

[1] Although R 338.2173 has been rescinded as of November 4, 2021, the substance of "Rule 73" as cited by the parties is now bifurcated into R 338.2171(2)(g) and R 338.2171b(g). The former provides: "An establishment or school shall comply with all of the following minimum operational requirements: . . . All waste materials including, but not limited to, hair clippings, paper, tissue, and single-use tools must be disposed of in a covered waste container." The latter provides: "A licensee, student, or apprentice shall satisfy all of the following: . . . Once hair care services are completed on a patron, remove any hair clippings from the floor." Because the fall occurred in 2017, "Rule 73" as cited by the parties would have been applicable at that time.

[2] Administrative rules are generally interpreted in the same manner as statutes. See *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 270; 597 NW2d 227 (1999).

provide evidentiary support for plaintiff's claim of negligence, which she also set forth in her complaint.[3]

Ordinarily, a premises liability claim "arises solely from the defendant's duty as an owner, possessor, or occupier of land," and if the "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 v Trinity Continuing Care Services*, 296 Mich App 685, 692; 822 NW2d 254 (2012). However, the fact that the most direct cause of an injury was a condition of the premises is not always dispositive. For example, in a case where the plaintiff slipped and fell on mud in the defendant's yard, sustaining injuries as a result, while being chased by defendant's dog, the plaintiff was permitted to bring a negligence claim based on the defendant's failure to control the dog. *Hiner v Mojica*, 271 Mich App 604, 605-608, 615-616; 722 NW2d 914 (2006). A person may bring both a premises liability claim and a negligence claim against the same person based on violations of distinct duties, based on whether the claim is based on "the overt acts of a premises owner on his or her premises" or "injury by a condition of the land." *Kachudas v Invaders Self Auto Wash Inc*, 486 Mich 913, 914; 781 NW2d 806 (2010).

Plaintiff alleges, in part, that defendant's owner directly led plaintiff into the hair clippings under circumstances where plaintiff would not have been able to see the clippings because Delly obstructed the view. The allegations could constitute circumstances under which defendant assumed a role under which plaintiff entrusted herself to defendant for some degree of control and protection. See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). I would find that plaintiff has articulated a claim of negligence based on defendant's conduct of directing her into danger, in addition to a claim of premises liability based on a hazardous defect in the premises. The alleged violation of "Rule 73" is therefore relevant, even if it does not directly confer a cause of action.

As the majority notes, it is not clear whether the trial court ever considered the nature of plaintiff's claim or claims, nor does the trial court appear to have addressed any arguments regarding "Rule 73." Nevertheless, I would affirm the trial court's order denying summary disposition.

/s/ Amy Ronayne Krause

[3] As the majority notes, plaintiff did not expressly argue that a violation of "Rule 73" should support a claim of negligence in so many words. However, I find such an argument implied in plaintiff's references to negligence on appeal; and plaintiff's complaint alleged, among other things, that defendant "was negligent" for failing to timely clean the floors, failing to comply with laws and ordinances, and failing to exercise reasonable care for plaintiff's safety. Although plaintiff could have framed the issue more clearly, that does not preclude an appellate court from addressing that issue. See *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002).