

Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2023

Elizabeth T. Clement,
Chief Justice

164574

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

MARY DIPERNA,
Plaintiff-Appellant,

v

SC: 164574
COA: 355207
Wayne CC: 19-011789-NO

GIUSEPPE MAINELLA and FILIPPO
MAINELLA,
Defendants-Appellees.

_____/

By order of October 7, 2022, the application for leave to appeal the April 14, 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), *Pinsky v Kroger Co of Mich* (Docket No. 163430), and *Becker v Enterprise Leasing Co of Detroit LLC* (Docket No. 163702). On order of the Court, *Becker* having been dismissed on March 1, 2023, and *Kandil-Elsayed* and *Pinsky* 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 and REMAND this case to that court for reconsideration in light of our decision in *Kandil-Elsayed* and *Pinsky*.

We do not retain jurisdiction.



s1120

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

MARY DIPERNA,

Plaintiff-Appellant,

v

GIUSEPPE MAINELLA and FILIPPO MAINELLA,

Defendants-Appellees.

UNPUBLISHED

April 14, 2022

No. 355207

Wayne Circuit Court

LC No. 19-011789-NO

Before: BORRELLO, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court’s order granting summary disposition in favor of defendants in this action that arose when plaintiff allegedly tripped in a pothole in the unlit parking lot of a building owned by defendants. The trial court determined that there was no genuine issue of fact that the pothole constituted an open and obvious hazard despite the darkness when plaintiff fell. We affirm.

I. BACKGROUND

Plaintiff operated a dog-grooming business for roughly three to four years out of a storefront that she rented from defendants. Plaintiff typically arrived at the business around 5:30 a.m. six days a week and parked in the same parking space each day. Because there was no functioning lighting in the parking lot, the lot was unlit when plaintiff arrived in the early morning. On November 30, 2017, plaintiff arrived at work and discovered that someone had parked in her usual spot. Consequently, she parked one space over. Upon exiting her vehicle, plaintiff stepped into the pothole and tripped, falling and allegedly sustaining multiple injuries. At her deposition, plaintiff testified that she had never noticed the pothole in the past because she had never parked in that particular space. She indicated that in all of the years using the parking lot, she had not seen the pothole. Plaintiff testified that none of her customers had ever complained about the parking lot’s condition, nor had she complained to defendants about the condition of the lot until after she tripped. After the fall, when the sun was up, plaintiff examined the lot and clearly saw the pothole. She described the pothole as being as big as a “dinner plate.” But, according to

plaintiff, it was not observable in the dark. There was a litany of evidence regarding the lighting of the parking lot, or lack thereof, and the availability of lighting from various sources.

In an affidavit executed by plaintiff's daughter and relied upon by plaintiff in challenging the motion for summary disposition, the daughter averred:

My mother . . . had been a tenant at this building for several years prior to the fall which occurred on November 30, 2017. During that time, I would stop in approximately once or twice a week to visit or assist my mother with her work. It is my opinion that the parking lot in question was in a state of serious disrepair for many months, if not years, prior to this trip and fall incident occurring. The parking lot had numerous potholes, some of which were haphazardly filled with asphalt "cold patch", and others that were just crumbling and deteriorating. It is my understanding that my mother complained numerous times to the owners of the building about various defects, but the problems were never addressed. It is my opinion that the pothole in question had been present for at least several months, if not years, prior to the fall. Given the amount of deterioration, its size and different colors, it would seem that such a defect would take quite some time to develop. I remember thinking for at least a year or so before her fall; that the building was poorly maintained and the parking lot was in a deteriorated state.

Plaintiff's deposition testimony did not contradict her daughter's affidavit. Plaintiff notes in her brief on appeal that "[m]uch of the parking lot was in a state of disrepair, and the pothole in question was quite large."

Plaintiff subsequently brought suit and, following discovery, defendants moved for summary disposition, arguing that there was no question of fact that the pothole was open and obvious and that defendants had no notice of the pothole. The trial court, without addressing the issue of notice, granted summary disposition to defendants, concluding that there was no question of fact that the pothole was open and obvious. The court explained that plaintiff had parked in the lot six days a week for several years and was aware of the deteriorated condition of the parking lot and aware of "the lack of lighting." The trial court emphasized that "[p]laintiff was familiar with the lot." Plaintiff now appeals.

II. ANALYSIS

Plaintiff raises two issues on appeal. She first argues that the trial court erred by granting summary disposition in favor of defendants because there existed a genuine issue of material fact regarding whether the pothole was an open and obvious hazard. In addition, if by chance defendants raise the notice issue as an alternative basis to affirm, plaintiff contends that there exists a question of fact with respect to whether defendants had constructive notice of the pothole.

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 159; 934 NW2d 665 (2019). Summary disposition is appropriate under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial

judgment as a matter of law.” A motion for summary disposition brought under MCR 2.116(C)(10) “tests the *factual sufficiency* of a claim.” *El-Khalil*, 504 Mich at 160. Courts must consider all the evidence in a light most favorable to the nonmoving party. *Id.* The motion may only be granted when there is no genuine issue of material fact. *Id.* “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, citation, and brackets omitted).

The moving party may satisfy its burden under MCR 2.116(C)(10) through the submission of affirmative evidence that negates an essential element of the nonmoving party’s cause of action or by demonstrating to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the party’s claim. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016). Once this initial burden is met, the nonmovant must “set forth specific facts showing that a genuine issue of material fact exists” and “may not rely on mere allegations or denials in pleadings.” *Id.* (quotation marks and citations omitted). “If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Id.* (quotation marks and citations omitted). The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). “Like the trial court’s inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party.” *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

B. PREMISES LIABILITY AND THE “DUTY” ELEMENT

Our Supreme Court in *Hoffner v Lanctoe*, 492 Mich 450, 459-460; 821 NW2d 88 (2012), provided the following analytical overview with respect to the law governing premises liability, explaining:

The law of premises liability in Michigan has its foundation in two general precepts. First, landowners must act in a reasonable manner to guard against harms that threaten the safety and security of those who enter their land. Second, and as a corollary, landowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land. These principles have been used to establish well-recognized rules governing the rights and responsibilities of both landowners and those who enter their land. 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. These rules balance a possessor’s ability to

exercise control over the premises with the invitees' obligation to assume personal responsibility to protect themselves from apparent dangers.

The starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his land. With regard to invitees,^[1] 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. Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect. [Citations omitted.]

Consideration of whether a danger or defect is open and obvious is an integral component of defining the duty owed by an invitor to an invitee. *Hoffner*, 492 Mich at 460. A possessor of land does not owe a duty to protect or warn an invitee relative to dangers that are open and obvious. *Id.* This is "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 461. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id.* The required analysis involves examination of the objective nature of the condition of the premises. *Id.*

In *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 95-96; 485 NW2d 676 (1992), our Supreme Court further observed:

[T]he "no duty to warn of open and obvious danger" rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case. A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions. However, *where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.* [Quotation marks and citations omitted; emphasis added.]

The emphasized language from *Riddle* reflects that a "duty" generally owed to an invitee does not arise when (1) an invitee actually knows of a pertinent hazard or danger, or when (2) an invitee should have reasonably been expected to discover the hazard because of its obviousness.

¹ There is no dispute in the instant case that plaintiff was an invitee.

C. DISCUSSION AND RESOLUTION

It is well established that “ordinary potholes in a parking lot” are considered “typical open and obvious dangers.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 520; 629 NW2d 384 (2001). This Court has acknowledged that an open and obvious danger can become a hidden danger in poor or nonexistent lighting, thereby giving rise to a factual question for a jury to resolve regarding whether the danger was indeed open and obvious. See, e.g., *Blackwell v Franchi*, 318 Mich App 573, 577-579; 899 NW2d 415 (2017); *Abke v Vandenberg*, 239 Mich App 359, 362-363; 608 NW2d 73 (2000).

In this case, plaintiff testified that she had never noticed or seen the particular pothole that caused her fall because she had never previously parked in that specific parking space. She also indicated that while the pothole was observable on casual inspection when light out or illuminated, the pothole could not be seen in the early-morning darkness. Although plaintiff may not have definitively known of the pothole that she stepped into upon exiting her minivan, which we must accept for purposes of the (C)(10) motion, she knew that the parking lot was in serious disrepair and had numerous potholes. She also knew that it was dark outside and that she was not parking her vehicle in the usual parking spot. Accordingly, the parking lot in general presented a hazard under circumstances of which plaintiff was fully aware. In other words, she had to have known that there was a possibility that there was a pothole or deteriorated pavement where she stepped when exiting her vehicle in the darkness at an unfamiliar spot. This is a case that is more accurately characterized as one in which no duty arose because plaintiff actually knew of the potential danger. *Riddle*, 440 Mich at 95-96. And that is exactly how the trial court analyzed the case. We conclude that the trial court did not err in granting defendants’ motion for summary disposition.

We acknowledge that plaintiff herself did not specifically testify that the parking lot was in disrepair and had potholes or that she knew that such was the case. But plaintiff’s daughter testified that the parking lot was in “a state of serious disrepair” and “had numerous potholes,” and plaintiff argued to the trial court that the lot was in bad repair and a deteriorated condition. Plaintiff parked in the lot six days a week for roughly three to four years, and she never testified or claimed that the parking lot was in good repair or that she had no knowledge that the lot was in serious disrepair and riddled with potholes. She did not contradict her daughter’s affidavit. Plaintiff contended that defendants had actual or constructive knowledge of the absence of lighting and of the crumbling, potholed parking lot. So certainly plaintiff, who spent considerably more time at the location than defendants, knew of the lack of lighting and the parking lot’s state of disrepair. We cannot find that a genuine issue of material fact exists on those matters.

In *Blackwell*, the plaintiff, while attending a dinner party, stepped from a hallway into an unlit mudroom, and there was an approximately eight-inch drop-off as one stepped into the mudroom from the hallway. *Blackwell*, 318 Mich App at 575, 578. The plaintiff fell while stepping into the mudroom, and there was evidence that the darkness or lack of lighting hid the sharp drop-off to those entering the mudroom. *Id.* There is no indication that the plaintiff in *Blackwell* was previously familiar with the mudroom or that she had any knowledge that she was walking into an unlit room until it was too late. Accordingly, *Blackwell* is easily distinguishable.

In *Abke*, the defendant argued that the trial court should have granted his motion for a directed verdict or his postjudgment motions under the following set of circumstances:

In December 1993, plaintiff went to defendant's retail produce outlet to purchase hay. Because the business did not have a sufficient amount on hand to fill plaintiff's order, arrangements were made for plaintiff to go to defendant's nearby supply barn. Plaintiff was met at the supply barn by defendant, who proceeded to lead plaintiff toward the hay storage area. After they walked down a hallway, defendant led plaintiff through a sliding door. After closing the door, plaintiff turned and fell off a loading dock into the truck bay. As a result of the fall, plaintiff sustained chest and shoulder injuries, some of which required surgery. [*Abke*, 239 Mich App at 360.]

Additionally, the "[p]laintiff testified that the loading dock area in which he fell was dark and that he could only see defendant's silhouette as defendant walked away from him just before the accident." *Id.* at 362. As in *Blackwell*, there is no indication that the plaintiff in *Abke* was previously familiar with the area of the accident and its darkened state. Plaintiff's reliance on *Abke* is thus unavailing.

We affirm. Having fully prevailed on appeal, defendants may tax costs under MCR 7.219.

/s/ Stephen L. Borrello
/s/ Jane E. Markey
/s/ Deborah A. Servitto