STATE OF MICHIGAN

COURT OF APPEALS

FELICIA HARRIS,

Plaintiff-Appellee,

v

DETROIT BOARD OF EDUCATION, DETROIT PUBLIC SCHOOLS,

Defendant-Appellant.

UNPUBLISHED
November 15, 2012

No. 306047
Wayne Circuit Court
LC No. 09-021830-NO

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff Felicia Harris sustained severe injuries when she slipped and fell while walking toward the stage of the Bunche Elementary School auditorium to receive the school's "parent of the year" award. She brought this action against defendant Detroit Public Schools (DPS) alleging that the auditorium floor was worn smooth, rendering it defective and dangerously slippery. Defendant contended that it lacked actual or constructive notice of this condition. The circuit court denied defendant's summary disposition motion, and we affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

The Bunche Elementary School was constructed more than 50 years ago, and the vinyl-tiled floor of its auditorium is the original one installed. The auditorium's center aisle slopes downward from the rear of the room to the stage. In the area of plaintiff's fall, the slope measures approximately seven percent.

On June 10, 2008, Bunche welcomed fifth grade parents to the auditorium for a graduation ceremony. Plaintiff recalled the day as humid and misty and that the auditorium windows remained open throughout the event. Unbeknownst to plaintiff, she had been selected as the fifth grade "parent of the year." When the award was announced plaintiff entered the aisle and began to walk toward the stage. She traversed only a few rows of seats when her left foot slipped from under her and she fell backward, striking her head and neck on the bottom of a chair. Plaintiff lost consciousness for a brief period. An ambulance took her to the hospital, where she underwent emergency laminectomy surgery and was also treated for an epidural hematoma.

Steven J. Ziemba, a safety consultant, provided a deposition on plaintiff's behalf.[1] Ziemba measured the floor's "slip resistance," also called the "coefficient of friction," where the surface was relatively level. He could not measure the coefficient of friction in the area of plaintiff's fall, however, because his equipment lacked accuracy on sloped surfaces. Instead, Ziemba visually inspected the floor in the center aisle and between the rows of seats, and felt the floor with his hands and feet. Ziemba detected that the floor in the aisle was "defectively worn smooth," and that "any water or moisture . . . would only serve as a lubricant and make it like a slide." Ziemba further observed that the vinyl tile in the aisle had become discolored, most likely from improper maintenance: "[Y]ou see a very prominent discoloration in the floor and I have a theory on that, that the discoloration came from excessive wet mopping that is putting too much water on it and leaving it to stand without dry mopping it up. And it just messed up the floor."

Ziemba explained that when the auditorium floor tiles were manufactured they contained tiny friction-creating projectiles called asperities. Asperities can be detected visually and by feel. Most of the asperities in the area of plaintiff's fall appeared to have eroded. Ziemba elaborated:

> The problem with the aisle floor is that it is worn smooth. It's become defective by being excessively worn.
>
> Increasing the risk of someone falling on this floor is the fact that the surface roughness is worn away, these asperities are just very sparse in this area, and the fact that we have a slope. We have an inclined floor surface. So this just adds to the danger or risk of someone falling. Because when you're on a slope or ramp, you actually want more friction. You need more friction.
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> And if someone is wearing high [heels] which I believe Ms. Harris was, you have a decrease in the contact area with the floor. So there's less contact, there's less chance to have these frictional forces work for you, and instead, the gravitational force overcomes it and you slip.

Ziemba opined that the asperities wore down due to both "pedestrian traffic" and lack of proper maintenance. His affidavit averred that the "auditorium floor . . . was significantly worn and defective for several years prior to the June 10, 2008 slip and fall incident," and that "a reasonable maintenance and inspection schedule would have resulted in the discovery of the defective and worn condition of the auditorium floor and prompted its repair." Ziemba produced a "peer-reviewed" article stating that "the expected usable life of [vinyl composition tile] in schools" is 22 years. He proposed that defendant should have refrained from excessive wet mopping of the aisle floor, applied a "wax type coating," or installed a carpet runner in the aisle.

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[1] Ziemba's affidavit avers that he has "over 39 years of experience in inspecting floors and ramps and evaluating their design, construction and maintenance, with specific attention to appropriate building codes. During which time, I have offered methods and solutions to reduce or eliminate the risk of slips/trips and falls on those surfaces."

Plaintiff's complaint alleges that defendant failed to reasonably maintain Bunche Elementary School and allowed a "defective and dangerous tile floor" to exist in the auditorium. Defendant sought summary disposition under MCR 2.116(C)(7) and (C)(10), contending that it enjoyed governmental immunity "because there is no evidence that Defendant had actual or constructive knowledge of the alleged defect." Defendant additionally insisted without elaboration that Ziemba's testimony failed "to meet the required threshold of 'recognized scientific knowledge.'" The circuit court ruled that plaintiff's complaint adequately set forth a claim in avoidance of governmental immunity and that the existence of a question of fact precluded summary disposition under subsection (C)(10).

II. ANALYSIS

We review de novo a circuit court's summary disposition ruling. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). We also review de novo the circuit court's ruling on the availability of governmental immunity. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578; 808 NW2d 578 (2011). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) 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 General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "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." *West*, 469 Mich at 183.

Pursuant to MCL 691.1407(1), "a governmental agency is generally immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Because defendant is a governmental entity, the following principles in MCL 691.1406 govern this case:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

The statute further provides, "Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place." Thus, the public building exception to governmental immunity imposes on defendant a duty to "repair and maintain" schools open to the public, and permits liability arising from "dangerous or defective condition[s]" that an ordinarily observant person would have apprehended three months or more before an injury occurs.

Defendant contends that plaintiff failed to present evidence supporting that it had "actual or constructive knowledge" of the allegedly dangerous and defective floor. Constructive notice of a defect in a public building "is demonstrated by showing that the agency should have discovered the defect in the exercise of reasonable diligence." *Ali v Detroit*, 218 Mich App 581, 586-587; 554 NW2d 384 (1996). Evidence that "a reasonable maintenance and inspection schedule would have resulted in the discovery" of the defect and "prompted its repair" can establish constructive notice. *Id.* at 587. Ziemba's deposition testimony supported that the floor's worn-smooth condition was readily apparent to the eye due it its discoloration, and could also be detected by simply feeling the floor's surface. Ziemba's affidavit avers that the floor had been in the same condition for years before plaintiff's fall. "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007), citing *Kroll v Katz*, 374 Mich 364, 371; 132 NW2d 27 (1965). Based on Ziemba's description of the floor, a reasonable jury could "conclusively presume[]" defendant's knowledge of the floor's dangerous condition. MCL 691.1407(1).

Other aspects of Ziemba's testimony, if credited by a jury, raise an additional inference that defendant knew of the floor's condition. The notice doctrine does not shield a premises owner from liability for injury where the premises owner itself unreasonably creates, tolerates or causes a dangerous condition. *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 604-605, 601 NW2d 172 (1999). In *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 62; 299 NW2d 807 (1941), the defendant, a grocery store, applied oil to its floor. The plaintiff slipped on the oil. The Supreme Court rejected that the plaintiff was required to prove that the defendant knew of the condition for a reasonable period of time, stating:

> It was not necessary for plaintiff to prove defendant had actual or constructive knowledge of the hazardous condition of its floor, as the alleged negligence was the act of defendant in creating this condition. Defendant could not by its own act create a hazardous condition and then demand that plaintiff, who was injured as a result thereof, prove it had knowledge of such condition. Knowledge of the alleged hazardous condition created by defendant itself is inferred. [*Id.* at 66-67.]

Record evidence supports that defendant improperly maintained the central aisle of the auditorium, causing the tile to become visibly discolored and palpably worn. Viewed in the light most favorable to plaintiff, defendant created the slippery floor by using too much water when cleaning it, thereby stripping away the friction-creating asperities. Given this evidence, the circuit court correctly denied defendant's motion for summary disposition.

Defendant additionally asserts that Ziemba's testimony failed to meet the evidentiary standards required under MRE 702. This argument is not included in defendant's statement of questions presented. Nevertheless, we address it briefly. Its gravamen appears to be that Ziemba never "tested" the exact location of plaintiff's fall, "speculat[ed]" regarding the condition of the floor, and that his opinion is inadmissible because it is based on "common knowledge." We find no merit in any of these challenges to Ziemba's testimony. As an experienced safety professional and consultant who has worked in this field for decades, Ziemba possesses specialized knowledge regarding floor coverings and floor maintenance. His deposition

testimony, affidavit, and written report support that he examined the entirety of the auditorium floor and utilized reliable methods of inspection. Aside from nonspecific criticism of Ziemba's methods and mischaracterization of his testimony as speculation, defendant has identified no legal or factual basis to question the foundation for his expert opinions. Accordingly, defendant's challenge to Ziemba's testimony under MRE 702 possesses no merit.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra