STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN ALLEN, a/k/a KATHLEEN MILLER, and JANET CORDTS, Plaintiffs-Appellants,	UNPUBLISHED January 17, 2013
v	No. 309904 Monroe Circuit Court
CDM ENTERPRISE, INC., d/b/a LONGBRANCH SALOON, Defendant-Appellee.	LC No. 11-031022-NO

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant in this premises liability action. We affirm.

I. BASIC FACTS

Plaintiffs were injured when they fell while exiting defendant's bar. They were walking one behind the other on a wooden ramp outside one of the exit doors when part of the ramp collapsed underfoot. The ramp was not equipped with handrails. In plaintiffs' deposition testimony, they admitted that there were no visible signs of defects; in fact, the ramp "looked safe" and "perfect." Plaintiffs had also observed other patrons entering and exiting using that same doorway.

Plaintiffs returned to the bar after their fall to take pictures of the area in which they fell. They argued that the pictures showed "weathered" wood such that defendant had constructive notice of a potential hazard. Defendant's owner testified that he regularly inspected the premises when looking for empty beer containers around the property. He testified that the only time there had ever been an issue with the ramp was in 2006 when it had to be repaired after a snowplow hit it.

Plaintiffs filed a complaint based on premises liability. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact). The trial court denied the motion under (C)(8) because, taking plaintiffs' allegations as true, plaintiffs stated a valid claim. The trial court granted the motion under (C)(10), concluding that "[t]here's no evidence to support the theory that there was a defect in

the wooden ramp for a sufficient amount of time to place the Defendant on notice, actual or constructive." The trial court further denied plaintiffs' motion for reconsideration and plaintiffs now appeal as of right.

I. ANALYSIS

Plaintiffs argue that a genuine issue of material fact exists regarding whether defendant breached its duty to inspect the premises and whether the ramp was unreasonably dangerous because it was too steep and had no handrails. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

"In a premises liability action, a plaintiff must prove (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 plaintiffs were invitees of defendant at the time the accident occurred. A premises owner owes an invitee "a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). This duty is breached when a premises owner "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." *Id.* A defendant's duty to protect invitees from dangerous conditions on the land arises when the defendant has actual or constructive notice of the condition. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

Plaintiffs argue that defendant's failure to adequately inspect the ramp was a breach of duty. A premises owner is required to make the premises safe, which includes a duty to inspect the premises to discover hazards. *Price v Kroger Co of Michigan*, 284 Mich App 496, 500; 773 NW2d 739 (2009). However, there is simply no evidence that defendant had actual or constructive knowledge of the "defect" in the ramp. It is clear from the testimony of Allen, Cordts, and Deana Spees, Allen's daughter, that the exit with the wooden ramp was being used by patrons of the bar on the night of the accident. Allen testified that the ramp "was perfect" as she stepped onto it. Further, Spees testified that she had used the wooden ramp on occasions before the night of the accident and had never noticed damage to the ramp. The trial court properly concluded that because (1) other patrons used the wooden ramp throughout the night, (2) there were no known complaints about the ramp's condition prior to the accident, and (3) Allen testified the ramp looked perfect before she walked on it, there is no evidence to show there was a defect in the ramp for a sufficient amount of time such that defendant had actual or constructive notice of the defect.

Although plaintiffs presented photographs taken several hours after the accident that allegedly showed the wood was "weathered," the appearance of the ramp prior to plaintiffs' fall

was the critical inquiry. Plaintiffs brought forth no evidence that defendant had constructive notice that the ramp was defective. Because plaintiffs failed to present evidence that would have raised a question of material fact regarding the adequacy of defendant's inspection of the ramp and regarding defendant's actual or constructive notice of the defect in the ramp, the trial court did not err in granting summary disposition in favor of defendant.

Plaintiffs also argue that the ramp contained design flaws because it was too steep and had no handrails. While plaintiffs raised the issue of the lack of handrails in their complaint, plaintiffs did not argue this issue either in their brief in response to defendant's motion for summary disposition or in the summary disposition hearing before the court. "Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Therefore, this issue was not properly preserved for appeal. However, this Court may decide an unpreserved question of law if all the facts necessary to resolve the issue have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

If a danger or defect is open and obvious, the premises owner has no duty to protect or warn invitees because the very nature of such dangers and defects "apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 461. "The test to determine if a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). In the context of open and obvious dangers, "liability may arise when special aspects of a condition make even an open and obvious risk unreasonable. When such special aspects exist, a premises possessor must take reasonable steps to protect an invitee from that unreasonable risk of harm." *Hoffner*, 492 Mich at 461. The inquiry centers on whether "the danger is *unreasonably dangerous* or [] *effectively unavoidable*." *Id.* at 463.

Plaintiffs admit in their brief that the alleged design flaws in the ramp, namely its steepness and lack of handrails, are "plain to see." Therefore, plaintiffs concede that these alleged defects are open and obvious. Nothing on the record supports a finding that the condition was unreasonably dangerous or effectively unavoidable. The exit with the wooden ramp was not the main or sole entrance/exit to and from the bar. Plaintiffs entered the bar by way of the main entrance that evening and were thus aware that the wooden ramp exit was not the only means of exiting the bar. Therefore, the court did not clearly err in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering