STATE OF MICHIGAN

COURT OF APPEALS

VALERIA COOK,

Plaintiff-Appellant,

v

DETROIT RECEIVING HOSPITAL, INC.,

Defendant-Appellee.

UNPUBLISHED
November 17, 1998

No. 204982
Wayne Circuit Court
LC No. 96-609034 NO

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm.

Plaintiff suffered an electrical shock when she attempted to turn on a light switch at her place of employment. Plaintiff sued defendant, the owner of the building, for negligence on the theory of premises liability. She claimed that, as an invitee, defendant owed her certain duties that it failed to fulfill. Plaintiff alleged that defendant (1) knew or should have known of the hazard, (2) failed to inspect the electrical system on a regular basis, and (3) failed to maintain the electrical system in safe working order. The trial court, finding that plaintiff failed to present any evidence that defendant had notice of a dangerous condition, granted summary disposition in favor of defendant.

Plaintiff first claims that the trial court prematurely granted summary disposition because discovery was incomplete as a result of defendant's inability to produce the light switch. She contends that the loss of the switch gave rise to an inference that the switch would have been unfavorable to defendant's defense, and that such an inference creates a genuine issue of material fact. We disagree.

Intentional destruction of evidence by a party raises a presumption against that party that the evidence would have been unfavorable to its case. *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957). Here, however, plaintiff merely argues that her experts were unable to determine the reason for the malfunction of the switch and render an opinion during the period of discovery because the switch was not produced. Plaintiff offered no proof that defendant intentionally destroyed the switch. Hence, the doctrine of spoliation is not applicable.

Plaintiff next argues that defendant had notice of the dangerous condition, or, in the alternative, defendant's knowledge of the defect was irrelevant because defendant caused the dangerous condition.

To prevail in her suit, plaintiff had to establish that defendant knew or should have known of the dangerous condition. In *Whitmore v Sears Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979), the Court explained:

> The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. He must not only warn the visitor of dangers of which he knows, but must also inspect the premises to discover possible defects. There is no liability, however, for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character *or* of such duration that the jury may reasonably conclude that due care would have discovered it. [*Kroll v* Katz, 374 Mich 364, 373; 132 NW2d 27 (1965).]

Plaintiff's deposition testimony does not establish that there were any visible defects on the switch. In addition, plaintiff failed to bring forth evidence that there were prior claims that the switch was defective or hazard. Thus, plaintiff failed to establish that the hidden defect was of such a character or duration that defendant should have discovered it with due care. *Id.* at 372. No evidence suggests that defendant was on notice, actual or otherwise, of any dangerous condition and, therefore, defendant cannot be held liable for failing to warn plaintiff of a defect or for failing to repair a defect of which it had no knowledge. *Whitmore, supra* at 8.

Plaintiff asserts that defendant was actively negligent by failing to inspect the premises. In instances where the land owner, thorough its active negligence, is the cause of a dangerous condition, notice of the existence of the condition is unnecessary. *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 67; 299 NW2d 807 (1941); *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991). This is because a defendant cannot "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." *Hulett, supra* at 66-67.

To show active knowledge, plaintiff must show more than defendant's failure to inspect the light switch. Plaintiff must also show that the switch itself was a hazardous condition created by defendant. Plaintiff failed to do so. Unlike *Hulett*, where the defendant's negligent conduct was clearly defined, plaintiff has failed to articulate what defendant's negligent act is. She alleges that defendant was negligent by failing to inspect the switch, but no showing has been made that an inspection would have revealed a dangerous condition. More importantly, no evidence was presented that it was defendant's own conduct that created the condition. In sum, there is simply no evidence linking defendant's conduct with plaintiff's injuries

Lastly, plaintiff argues that her claim could have been established through the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur "entitles a plaintiff to a permissible inference of negligence from

circumstantial evidence." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). It is used when a plaintiff is unable to prove its case by direct evidence of defendant's actual negligent conduct. *Id.* at 150. In order to prevail on the theory, (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. *Id.* at 150-151. Additionally, the true explanation for the cause of a plaintiff's injury must be "more readily accessible to the defendant than to the plaintiff." *Id.* at 151.

Plaintiff's argument that her claim may be established by use of the doctrine must fail. As discussed above, it is not clear what the cause of plaintiff's injuries were. For instance, the manufacturer of the switch may have produced a defective switch, or a surge in electricity may have caused the shock. Where more than one explanation for an injury exists, res ipsa loquitur should not be applied. *Id.* at 150-151. There is simply no reason to conclude that plaintiff's injury was the result of defendant's negligence. While plaintiff's injury may be considered the type which would not ordinarily occur in the absence of someone's negligence, there is simply no evidence to show that her injury was "caused by an agency or instrumentality within the excessive control of the defendant." *Id.* The mere fact that plaintiff suffered an injury on defendant's premises is insufficient to show that defendant was negligent. *Kroll, supra* at 373. Hence, the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage